August 19, 2004
Winnipeg, Manitoba

Forensic Evidence Review Committee

Final Report

Submitted to:
Mr. Bruce MacFarlane, Q.C.
Deputy Attorney General
Manitoba Justice

Manitoba

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Background and Terms of Reference for the Committee

Background

On April 23, 2003, the Deputy Minister and Deputy Attorney General for the Province of Manitoba, Mr. Bruce A. MacFarlane, Q.C., announced the establishment of an advisory committee whose goal it was to review homicide cases from the previous fifteen (15) years in Manitoba in which hair comparison evidence was relied upon to secure a conviction. The over-arching goal of this initiative was to actively seek out any possible miscarriages of justice that may have resulted from a reliance on hair comparison evidence. It was decided that the Committee would be composed of six (6) members from the Manitoba Department of Justice, the Defence Bar, Manitoba police and an independent scientific expert.

Prior to the introduction of DNA testing for forensic purposes in Canada in the mid-1990's, microscopic hair comparison was used to assess forensic evidence. While microscopic hair comparisons can give valuable evidence in many instances, DNA tests are far more reliable when the question is whether or not a suspect can be excluded as a source of a hair sample.

The following Terms of Reference for the Committee were established:

Terms of Reference

The Deputy Attorney General of Manitoba, Bruce A. MacFarlane, Q.C., has established an advisory committee to examine criminal cases prosecuted in Manitoba where the Crown relied upon certain types of forensic evidence.

Composition of the Advisory Committee

The Committee shall consist of the Assistant Deputy Attorney General as Chair; a Senior Crown Attorney; a lawyer in the private sector in Manitoba designated by the Association in Defence of the Wrongfully Convicted; a representative from each of the Royal Canadian Mounted Police and the Winnipeg Police Service; and a forensic expert unconnected with any law enforcement agency, designated by the Deputy Attorney General after consultation with the other members of the Committee. Other persons with expertise may be consulted by the Committee from time to time, through the Chair.

Objectives of the Advisory Committee

The Committee shall examine all cases of culpable homicide:

-prosecuted in Manitoba during the past fifteen (15) years;

-in which the Crown tendered and relied upon microscopic hair comparison evidence;

-where the accused pleaded not guilty at trial, asserting factual innocence, but was found guilty; and

-appealed the conviction to the Court of Appeal, still asserting factual innocence, and the appeal was dismissed;

to consider whether there is a reasonable basis to believe that, by virtue of this evidence, a miscarriage of justice has taken place.

Amongst other issues, the Committee shall consider:

-the nature of the evidence tendered in the context of the trial record;

a. whether, with the benefit of current scientific expertise, the conclusions tendered by the Crown at trial were incorrect or overstated;

b. the extent to which the Crown relied upon this evidence to prove the case;

c. any comments made by the trial judge concerning the probative value or weight to be given to this evidence;

d. any other factors that may assist in assessing whether a miscarriage of justice has occurred.

During the course of its work, the Committee, through the Chair, may arrange for DNA or other scientific testing of the evidence to assist the Committee during the review.

The Committee shall provide a report on its findings and recommendations to the Deputy Attorney General by or before July 1, 2004.

Public communication concerning the work of the Committee during the review, should that prove necessary, will be made through the Chair. Upon receipt of the report of the Committee, the Deputy Attorney General will publicly announce the results of the Committee's work.

Committee Membership

As of the time of the writing of this report, the following individuals were part of the Committee:

1) Mr. Richard A. Saull
(Committee Chair)
General Counsel
Manitoba Department of Justice

2) Mr. Don Slough
Director of Special Prosecutions and Appeals
Manitoba Department of Justice

3) Mr. Ian Garber
(Representative of the Association in Defence of the Wrongfully Convicted (AIDWYC))
Attorney-at-law, Winnipeg, Manitoba

4) Inspector David Thorne
Duty Officer
Winnipeg Police Service

5) Inspector Jean-Michel Blais
Officer-in-charge, Major Crime Services
'D' Division, Royal Canadian Mounted Police, Winnipeg, Manitoba

6) Professor Norm Davison
Department of Physics and Astronomy
University of Manitoba, Winnipeg

Research Methodology

In order to properly determine the actual number of cases that fit the criteria listed in the terms of reference established for the Committee, the services of a summer student, Ms. Kim Antonio, were acquired. She proceeded with an extensive search using Quicklaw, the Manitoba judgments database at the Court of Appeal level as well as a list of cases provided by the R.C.M.P. Forensic Laboratory in Winnipeg[1]. By cross-referencing the cases noted in the lists, Ms. Antonio was able to capture a total of 175 cases, fifty-seven (57) of which were Court of Appeal decisions that were relevant to the terms of reference. Through reading the decisions as documented on Quicklaw, she was able to eliminate 136 of the cases for various reasons such as:

-the case did not involve a homicide;
-the appeal involved bail conditions or a sentence and not factual innocence;
-the appeal was allowed;
-the appeal related to a defence (e.g. self-defence, intoxication) or was regarding a lesser charge (e.g. manslaughter, second degree murder) and therefore lacked the factual innocence requirement as defined in the terms of reference.

Ms. Antonio then further reduced the remaining cases captured by reading the trial transcripts in order to determine if hair evidence had been tendered in the cases. Of the remaining thirty-nine (39) cases, she was able to eliminate thirty-seven (37) of them because either:

-the appeal had been allowed;
-factual innocence had been alleged but hair evidence was never tendered; or
-no factual innocence had ever been asserted by the accused.

Following the review of the trial transcripts, only two (2) relevant cases remained. They were the Kyle Wayne Unger case and the Robert Stewart Sanderson case[2]. Towards the end of August, 2003, summaries of these cases as well as excerpts of the trial transcripts relating to the hair evidence (the Crown's and Defence counsel's closing remarks as well as the jury charge as it related to the hair evidence) were prepared and distributed to members of the Committee.

During this culling process, a letter was sent from the then-chair of the Committee, Mr. Rob Finlayson, soliciting the input from members of the Defence Bar to provide any cases that they were aware of that fit the above criteria. No responses were received.

Upon study of the two (2) remaining cases, several issues remained to be addressed. One was the question of the availability of hair samples in both cases to be analyzed. If available, what would be

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[1] The list, completed by Mr. Jim Cadieux, the laboratory manager, was entitled "Homicide Cases Completed by Hair and Fibre Section, 1988-1993". Mr. Cadieux reported to the Committee that from 1988 to 1993 inclusively, the Hair and Fibre Section of the R.C.M.P. laboratory in Winnipeg had completed approximately 1400 cases. Of these, approximately 120 were homicide investigations. These cases were placed in the above report. After 1993, microscopic hair comparisons were only performed if no DNA evidence establishing a forensic association could be made or at the insistence of the investigator.

[2] Hereafter referred to as the *Unger* and *Sanderson* cases respectively.

the minimal length required for a DNA analysis? It was determined that a mitochondrial DNA (mtDNA) testing ('Polymerase Chain Reaction - Short Tandem Repeat' or PCR-STR) would be the best form of analysis which could be performed on less than one centimeter of hair. It was further determined that no accredited laboratory in Canada carried out this type of testing and that only laboratories in the United States and the United Kingdom completed this type of analysis. During this portion of the Committee's deliberations, an article was provided for the Committee's perusal which indicated that mitochondrial DNA analysis was less consistent than nuclear DNA analysis because of the possibility that "...two different tissues of the same person could harbor different somatic mutations, erroneously excluding a match."[3]

It was further learned that nuclear DNA analysis had been attempted on the hair in the *Sanderson* case in early 2000. Unfortunately, no profile was obtained. Consequently, any further testing would have to be done through mitochondrial DNA analysis.

During a meeting of the Committee on December 19, 2003, it was decided that mtDNA analysis would be performed on the exhibits available in both the *Sanderson* and *Unger* cases. This decision was made, cognizance taken of the fact that in the Committee's majority view, the probative value of the hair comparison evidence tendered in both cases was limited and that the hair comparison evidence may well have had a negligible effect on the decision to convict both individuals. As well, considering the small number of cases discovered, it was determined to proceed with the analysis.

In early June 2004, with the consent of Mssrs. Unger and Sanderson, DNA samples were obtained and forwarded to an investigator of the Royal Canadian Mounted Police, Corporal Daniel Barnabe of 'D' Division Major Crime Services (Winnipeg). He subsequently took possession of the original hair exhibits that had been found at the initial crime scenes. He then transported the initial exhibits as well as the DNA samples provided by Mssrs. Unger and Sanderson to an American laboratory which had been approved by all interested parties of the Committee, 'Mitotyping Technologies, LLC', of State College, Pennsylvania.

In order to better appreciate the factual basis upon which both the *Unger* and *Sanderson* cases rest, it is opportune to present a brief historical overview of both case files.

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[3] See Pinar E. COSKIN, Eduardo RUIZ-PESINI and Douglas C. WALLACE of the Center for Molecular and Mitochondrial Medicine and Genetics in "Control region mtDNA variants: Longevity, climatic adaptation, and a forensic conundrum", in *Proceedings of the National Academy of Sciences of the United States*, March 4, 2003, volume 100, number 5, at pages 2174 to 2176.

The Kyle Wayne Unger File

Background

On June 24, 1990 the nude body of Brigitte Grenier, a sixteen (16) year-old high school student, was found in a creek in a heavily wooded portion of a ski resort near Roseisle, Manitoba. The previous evening she had attended a rock festival which had taken place on the ski resort grounds. She had been viciously beaten, bitten and otherwise assaulted. The principal cause of death was asphyxiation due to strangulation, but she had also suffered heavy blows to the head which would have contributed to her death.

Kyle Unger, then nineteen (19) years of age, along with the accused Timothy Houlahan, then seventeen (17) years of age, had both attended the same rock music festival on June 23, 1990. While Houlahan had never met the victim, Unger was acquainted with her through high school.

Evidence at trial disclosed that the two (2) accused had gone go the festival separately with a group of friends. Both had consumed a considerable amount of alcohol and Unger, some LSD as well.

The following sequence of events is variously described by the witnesses:

1) At around midnight, Houlahan and the victim began dancing together.
2) Unger observed this activity whereupon he told his friend, one Beckett, that he was interested in having sexual intercourse with the victim.
3) The deceased was last seen dancing with Houlahan at approximately 1:30 a.m. whereupon the two (2) of them left the area towards a heavily wooded and secluded area of the resort. Houlahan was not seen again until between 4:00 and 4:30 a.m. At this time, his face and clothing were muddied. There where scratches on his face and blood on his chin.
4) Shortly after the deceased and Houlahan left, Unger returned from the washroom whereupon he told Beckett that he had seen the deceased "going at it with some guy over there".
5) When the music stopped between 2:00 – 2:30 a.m., Unger told Beckett that he was going to "go look for some tail". Beckett, who had been drinking, was unsure of how long Unger was gone, but allowed that it could have been for as little as twenty (20) to thirty (30) minutes. Other witnesses could only say that they saw Unger around a large camp-fire between 3:30 – 4:00 a.m. He was described by them as not having any mud or dirt on his clothing, or scratches or bruises to his face.

Both Unger and Houlahan were charged with the first degree murder of Brigitte Grenier. Unger was arrested on June 29, 1990.[4] The joint trial began on January 20, 1992 in the Court of Queen's Bench (Winnipeg) before Chief Justice Hewak with a jury. Unger was convicted on February 29, 1992 and sentenced to life imprisonment without eligibility for parole for twenty-five (25) years. He appealed his conviction and sentence asserting factual innocence throughout. His appeal to the Manitoba

[4] Unger proceeded to a preliminary hearing. Prior to its conclusion, the Crown entered a stay of proceedings against him on December 11, 1990. Subsequent to the stay of proceedings, but only after learning of conversations Unger had with various inmates including Jeffrey Cohen and after the R.C.M.P. conducted an undercover operation with operators Forbes and Tremblay, the Crown preferred a direct indictment. On June 25th, 1991 Unger was rearrested and charged once again with first degree murder.

Court of Appeal was dismissed on July 7, 1993.[5] His application for leave to appeal conviction to the Supreme Court of Canada was dismissed on December 02, 1993. He remains incarcerated in a federal institution.

The case against the accused Unger was only partially circumstantial. There was a great deal of direct evidence against Unger, including a confession made to the police as part of the undercover operation.

Review of the Evidence

The trial judge summarized the case to the jury (in part) as follows:

> "Basically the Crown takes the position that Houlahan and Brigitte Grenier were introduced to one another during the course of the evening of the Woodstick Music Festival. They seemed to hit if off to the point where they were dancing together very closely, kissing and ultimately went off together into the area of the creek to continue a necking session and that her clothing was removed consensually.
>
> The Crown takes the position that things got out of hand and that Houlahan persisted with his sexual advances, but that Brigitte Grenier refused to go any further. Because of that, a disagreement between Brigitte Grenier and Houlahan arose; Unger came upon the scene. The Crown says that because Unger had been earlier rebuffed by Brigitte Grenier, he became angry and began to tear the clothing off Brigitte Grenier, beat her, strangled her and he was joined in this beating by Mr. Houlahan and they both beat her and then dumped her body in the creek.
>
> The Crown says that the biting of Brigitte Grenier's breasts and the tearing off of Brigitte Grenier's clothes was sexual assault, and that assault continued until Brigitte Grenier was choked and beaten to death by Unger and Houlahan. On that basis the Crown takes the position that they are both guilty of first degree murder."
>
> (Transcript, Vol. 20, Jury Charge, page 37, line 23-page 38, line23)

Jeffrey Cohen

- "He testified that he was in the lockup at the same time as the accused, Kyle Unger and that Kyle Unger made the remark to him, "I killed her and got away with it"
  (Transcript, Vol. 29, Jury Charge, page 47, lines 5-8)
- "You've heard the position that has been taken by counsel on behalf of Unger about Mr. Cohen's evidence and that will be something that you will have to review."
  (Transcript, Vol. 29, Jury Charge, page 47, lines 13-16)
- Note: The defence position is that this alleged conversation never occurred. Unger himself testified to this. Unger claims that he never went back to the public safety building following his

[5] See *R. v. Unger* [1993] M.J. No. 363 (Appendix I)

release from the preliminary hearing (when the conversation allegedly occurred) and that he didn't normally interact with Cohen during his time there.
(Transcript, Vol. 26, Testimony of Kyle Unger, page 11, lines 10-25)

Unger's own statements to undercover police

- "The defence to that position is that he was not there when Brigitte Grenier was killed, that he made up the story which he told the undercover police officers because he wanted to impress them and ingratiate himself to them so that he would be able to become part of their criminal organization or gang and to get a job with them."
(Transcript, Vol. 29, Jury Charge, page 47, line 21, page 48, line 2)
- Unger also mentioned in his testimony that prior to the confessions he had told Tremblay he had not done it and that he had been arrested for a murder he did not commit on three (3) separate occasions.
(Transcript, Vol. 26, Testimony of Kyle Unger, page 13, line 13)

The Bite Marks

- "The bite marks on Brigitte Grenier's body were not his, and this was supported by the evidence of Dr. Sperber, who testified to that effect in court."
(Transcript, Vol. 29, Jury Charge, page 48, lines 3-6)
- Note: The defence position (as articulated by Mr. Pinx in closing) is that Houlahan's failure to provide teeth impressions should be viewed as indication of guilt.
(Transcript, Vol. 28, Closing Address of Mr. Pinx, page 28, lines 1-2)

Unger remained clean, in the same clothes, all evening

- "When people saw him that evening, he did not have any mud, blood on his clothes and did not have any scratches on his face or hands."
(Transcript, Vol. 29, Jury Charge, page 48, lines 7-9)

The Hair Evidence

- Exhibit # 1103, which was identified as a hair from the *Nike* sweatshirt, was "...consistent with having originated from the known scalp hair samples reportedly from Unger."
(Transcript, Vol. 16, Testimony of J.E. Cadieux, page 10, lines 14-18, page 11, lines 9-11)
- The cross-examination mainly involved how easily humans lose hair, and that there must have been another way Unger's hair had gotten there (such as during an earlier conversation, etc.)
- Cadieux testified that he did not test the hair against samples from the McTavish or Williment families. McTavish was the owner of the sweatshirt, and Williment, his girlfriend, was the person who lent it to Ms. Grenier for the evening.
(Transcript, Vol. 16, Testimony of J.E. Cadieux, page 21)

Description of Hair Evidence

- "He was at the murder scene, is supported in part, you may think, and it's a matter for you, by the hair similar to his found in her clothing at the scene. Now, Cadieux, the hair and fibre expert explained what he meant by similar to. He meant that in all probability from the same source. It was not an accidental match. If it were an accidental match, he would not have used the phrase similar."
- "He described for you a whole series of tests that he used before he could even use the word similar. You recall the tests, examining the sheath, the cortex, the color distribution, all of it. But again, as it was pointed out by counsel on cross-examining, that hair could have fallen on her t-shirt when she and Unger were speaking together. It's a matter for you to consider whether that's likely or it's likely it came away from his head as he struggled with her when the prosecution says he assisted in killing her."
  (Transcript, Vol. 28, Closing Address of Mr. Dangerfield, page 76, line 9 to page 77, line 2)

Explanation of Mr. Cadieux's testimony

- "You'll recall, however, that he could only say that the questioned hair is consistent with having come from the same source, not that it did. He also talked about the probability and likelihood of the hair coming from that source and how the hair could find its way onto pieces of clothing and so on."
  (Transcript, Vol. 29, Jury Charge, page 33, lines 10-16)
- "When he matched the hair taken from the *Nike* sweatshirt of Houlahan, that hair was consistent with having come from Unger. Bear in mind that he was not able to say that those hairs definitely came from Houlahan or from Unger, merely that they were consistent with having come from that source. He testified that everyone loses between 80 to 100 hairs a day in a natural way, and that hairs can be transferred from one person to another. He stated that there was no way that he could tell how long a particular hair may have been in the place in which it was found."
  (Transcript, Vol. 29, Jury Charge, page 111, line 18 to page 112, line 40

Comments on the Hair Evidence

- One issue regarding the hair evidence in this case is that it was not described consistently. Reference was made to a hair on Brigitte's t-shirt, a hair on the *Nike* sweatshirt (correct) and also that the *Nike* sweatshirt in question belonged to Houlahan. This continued in the appeal factums as the Crown described the sweatshirt as Houlahan's (Respondent's factum, page 3, paragraph 9) and the Defence referred to it as belonging (at least at the time of the incident) to the deceased (Appellant's factum, page 3, paragraph 14).
- As Unger's position is that he was not at the crime scene on the night in question, the hair being viewed as found on Houlahan's clothing may have had more impact as evidence than if it had been accurately described as being found on Brigitte Grenier, as Unger has admitted to having spoken with her that evening.

Other Matters of Relevance

- Houlahan did not testify at trial. He provided the police with statements, a lie detector test and various interviews. Houlahan admitted to being there but asserted the defence of duress at trial, claiming Unger was the main aggressor.
- None of the multiple searches of Unger's home or car yielded any evidence of hair or fibres belonging to Brigitte Grenier.
  (Volume 16, page 16)
- The Voir Dire transcripts cite the reasons for Unger's re-arrest to be his confession, the information provided by his former cellmate Cohen and the statements from Houlahan. There was no mention of the hair evidence.
  (Vol. 11, Voir Dire Proceedings, p. 2)

Continuity of the Hair Evidence

The following is a brief synopsis of the continuity of the relevant hair samples.

A. Grenier's sweatshirt: R.C.M.P. # 703, trial exhibit #14

The sweatshirt itself is listed as R.C.M.P. exhibit # 703. The sweatshirt was seized from the murder scene on June 24, 1990 at 19:23 by Constable Anderson. Anderson then transferred the sweatshirt to the R.C.M.P. Carman detachment on June 25, 1990 at 02:33 a.m.

July 4, 1990: The sweatshirt was picked up from the Carman detachment at 10:05 a.m. by Constable Anderson and brought to the Crime Detention Lab (now Forensic Lab Services Winnipeg) on the same day. It was delivered at 11:48 a.m. Hair samples were seized from this exhibit (see B, below).

October 23, 1990: Anderson retrieved exhibit # 703 from the Crime Detection Lab at 13:51 and transferred the exhibit to the main R.C.M.P. exhibit locker in Carman. The exhibit arrived on the same day at 17:05.

October 29, 1990: Exhibit # 703 was transferred from the Carman R.C.M.P. exhibit locker and brought to the Provincial Court house in Winnipeg.

March 3, 1992: All exhibits were verified as present by court staff.

October 24, 1995: All exhibits with the exception of a transcript of Houlahan's polygraph and 58QB, a map and report of festival area, were signed out of exhibits by R.C.M.P. member Kathie King.

March 3, 1997: Almost all physical exhibits were destroyed at Carman Hospital in the incinerator.

B. Hair Samples found on Grenier's sweatshirt

These hairs were seized and compared to hairs volunteered by several suspects, including Kyle Unger.

These strands of hairs were listed as R.C.M.P. exhibits # 1101, 1102, 1103, 1104, 1105, 1106 and entered in court as court exhibit # 27.

June 25, 1990: Kyle Unger volunteered hair samples while being detained at the Carman R.C.M.P. detachment. These volunteered samples were listed as R.C.M.P. exhibits # 3218 and # 3219. These exhibits were entered into court as exhibits # 36 and # 37. Unger's volunteered sample was found to be comparable to samples seized from Grenier's sweatshirt.

June 25, 1990: Exhibits # 1101-1106 were brought to the Crime Detection Lab at 16:55.

October 23, 1990: Exhibits # 1101 and # 1102 were picked up by Constable Anderson from the Crime Detection Lab in Winnipeg at 13:51 and brought to the Carman main exhibit locker at 17:05.

October 29, 1990: Exhibits # 1101 and #1102 were picked up at the Carman exhibit room and delivered to the Provincial Courthouse.

It is important to note that the actual hairs remained at the R.C.M.P. Crime Detection Lab and were not entered into court as exhibits. Just the exhibit bags themselves were entered during the trial proceedings. The hairs arrived at the forensic laboratory on Academy Road in Winnipeg on June 25, 1990, the day after the murder. The hairs themselves remained there in the biology section. In October 2002, the hairs were sent to the Manitoba R.C.M.P. Headquarters vault for archival purposes when the biology section of the Academy Road lab closed.

The Robert Stewart Sanderson File

Background

In the early morning hours of August 6th, 1996, Jason Joseph Gross, Thomas Russell Krowetz and Stefan Heinz Zurstegge were brutally murdered in Zurstegge's residence at 319 Semple Street in the City of Winnipeg. The victims, who had been shot and stabbed, were discovered at approximately 8:00 a.m. by Zurstegge's father who immediately summoned the Winnipeg Police and Ambulance Services.

As is routine with all homicide investigations, the Winnipeg Police Service Identification Unit conducted a meticulous and thorough search at the murder scene and surrounding area while the Service's Homicide Unit simultaneously carried out their own investigation into the slayings. As a result of this collaborative effort, Robert Sanderson, Roger Sanderson (no relation) and Robert Tews were jointly charged with the three (3) counts of first degree murder.

On June 26th, 1997 all three (3) co-accused were convicted and sentenced to life imprisonment with no eligibility for parole for twenty-five (25) years. Robert Sanderson appealed his conviction to the Manitoba Court of Appeal, however, on March 19th, 1999 his appeal was dismissed.[6] He then sought leave to appeal from the Supreme Court of Canada and it too was dismissed, this time on September 16th, 1999. He remains incarcerated in a federal institution.

In addition to hair evidence, the Crown also relied on other evidence submitted at trial, which was for the most part circumstantial in nature.

Review of the Evidence

- Ms. Taisa Marunchak worked as a prostitute for Robert Sanderson and was living with him in a room at the Stock Exchange Hotel approximately two (2) and one half weeks prior to the murders. Marunchak had contact and conversations with both Robert Sanderson and co-accused Tews in the hours preceding and shortly after the killings. Of note, Maranchuk testified to witnessing Robert Sanderson and Tews being in possession of jewellery belong to one of the victims, Krowetz. She described Robert Sanderson as emptying a paper bag full of jewellery onto a bed and stating: "Looks good on me. Besides Russ won't need it anymore."

- She described Robert Sanderson making a phone call to the Manitoba Warriors "booze can", stating: "Is the big goof there…Okay we'll be down in a bit". Robert Sanderson then gave a large knife to Tews and left the room with two (2) guns. Other witness evidence established that Robert Sanderson and Tews met up with co-accused Roger Sanderson at the booze can shortly after the victim Krowetz had left.

- Maranchuk gave evidence that following the murders Robert Sanderson and Tews were in the hotel room and that Tews was without his shirt and shoes, telling her that he had gotten blood on them.

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[6] See *R. v. Sanderson* [1999] M.J. No. 114 (Appendix II)

- Maranchuk also testified that Robert Sanderson and Tews discussed cleaning out Robert Sanderson's car as there was blood on the seat and that they had to burn or bury something.

Motive

- Some time in July 1996, Robert Sanderson paid James Delorme, a member of the Manitoba Warriors, $1,000.00 so that Maranchuk could work as a prostitute for him. The Crown presented the position that the three (3) victims were involved in prostitution and attempting to move into and control the area where Robert Sanderson had Maranchuk soliciting for him. This, the Crown contended, was the motive for Robert Sanderson *et al* to murder the three (3) victims.

Forensic Evidence

- Drops of oil were located on the driveway at the rear of 315 Semple Street, the property immediately adjacent to 319 Semple Street. Comparisons carried out at the R.C.M.P. Lab determined that this oil sample was similar in composition to the oil extracted from Sanderson's 1988 Ford Cougar.

- Trace amounts of blood from the victim Krowetz were located on the seatbelt on the passenger side of Sanderson's 1988 Ford Cougar.

- Blood from the victims Krowetz and Gross was found on a baseball bat that was located in the trunk of Robert Sanderson's 1988 Ford Cougar.

Witness Testimony of Brent Stevenson

- Brent Stevenson was an associate and close friend of co-accused Roger Sanderson. Stevenson possessed intimate knowledge of the criminal activity that the three (3) co-accused were involved in and had conversations with Roger Sanderson about the killings in the days and weeks that followed.

- Stevenson describes being at the booze can with the three (3) co-accused just before the murders occurred. At one point in the evening, he saw Roger Sanderson speaking with the victim Krowetz. After Krowetz left the booze can, Robert Sanderson and Tews arrived and were armed with a knife, a rifle and a pistol. Stevenson saw Tews wrap the rifle and knife up in a blanket and all three (3) co-accused left the booze can together. The following day, Stevenson received a phone call from Roger Sanderson telling him to watch the news on TV, which he did. It was at this time that he learned of the triple murder involving the victim Krowetz.

- In his testimony, Stevenson recounts Roger Sanderson telling him: "Robert Sanderson walked into the house and capped them like it was nothing."

Hair Evidence

- One of the pieces of evidence that was relied on at Robert Sanderson's trial and subsequent appeals was a hair that pathologist Dr. Balachandra had located on Stefan Zurstegge's right foot. R.C.M.P. Hair and Fibre Specialist James Cadieux examined this hair and determined it to be microscopically consistent with a scalp hair that Robert Sanderson had voluntarily supplied to the homicide investigators.

- In cross-examination, counsel put the question: "If someone else were in the car of Mr. Sanderson and they picked up a hair in the course of sitting in the car and moving around in the car and went into this location, that's another means by which hair could be transferred from one to another?" The witness answered: "Yes". (Transcript, Vol. 11, Testimony of Mr. Cadieux, page 20, lines 21-25)

Description of Hair Evidence

- "On Stefan Zurstegge's leg is a hair that Mr. James Cadieux finds is microscopically consistent with a hair that he had from Robert Sanderson." (Transcript, Vol. 17, Closing Address by Mr. Dangerfield, page 10, lines 29-32)

- "There is no question, members of the jury, if you accept the evidence of Taisa Marunchak and the evidence of Brent Stevenson, and the physical evidence of the car and the hair on Zurstegges' leg, that Robert Sanderson is tied in to this murder, as well". (Transcript, Vol. 17, Closing Address by Mr. Dangerfield, page 13, lines 6-10)

- "The question of hair comes up at this particular juncture. This is the evidence that the Crown really is relying on here". (Transcript, Vol. 17, Closing Address by Mr. Margolis, page 41, lines 21-23)

- Hair shedding leaves the possibility that Sanderson (accused) shed hair onto something or someone and it was then "transferred" to the deceased. (Transcript, Vol. 17, Closing Address by Mr. Margolis, page 43, lines 4-32)

Explanation of Mr. Cadieux's testimony

- "A scalp hair found on the leg of Stefan Zurstegge, which according to the expert Cadieux, was microscopically consistent with the hair of Robert Sanderson". (Transcript, Vol. 18, Jury Charge, page 40, lines 10-13)

- "Defence says that there is no unequivocal evidence that the hair on Stefan Zurstegge's leg was that of Robert Sanderson. The hair and fibre expert could only say that it was consistent with Robert Sanderson's hair. Defence counsel points out that even if it were the hair of Robert Sanderson there is no unequivocal evidence as to how the hair got there. Mr. Cadieux, the hair and the fibre expert, said that the hair could have been transported into the house by another means or another person". (Transcript, Vol. 18, Jury Charge, page 40, lines 21-29)

Other Matters of Relevance

- None of the three (3) accused testified at trial.

- Essentially, Sanderson concedes the fact that his car may have been there but claims he lent it to someone. He was unwilling to reveal the identity of who had borrowed his car due to the Los Bravos' "Code of Silence." (Appellant's Factum, page 34, paragraph 33, partially mentioned in Vol. 18, Jury Charge, page 41, lines 6-12)

- In the September 10th interview with Robert Sanderson, the police advised him that they found a hair on Zurstegge's leg. Sanderson responded: "Maybe somebody brought a hair from my car?" He is told that they will do DNA testing, which will ultimately prove that it belongs to him. (Police Interview with Robert Sanderson, September 10, 1996, page 25)

Continuity of the Hair Evidence

The following is a brief synopsis of the continuity of the hair sample that Robert Sanderson provided to the Winnipeg Police Service during the course of this investigation:

- On August 7th, 1996 Robert Sanderson volunteered both hair and blood samples to the Winnipeg Police Service.

- On August 9th, 1996 the Winnipeg Police Service Identification Unit delivered these samples to the R.C.M.P. Forensic Laboratory where they were examined by J. Cadieux.

- On May 28th, 1997 these samples are entered as exhibits at trial, along with the hair that was located on the leg of the victim Zurstegge (Exhibit # 504). At the request of Defence Counsel David Margolis and under direction of the Court, the following six (6) hair samples that had been entered as exhibits were turned over to Margolis so that he could arrange for an independent analysis:

    1. Known scalp hair sample from Robert Sanderson
    2. Known scalp hair from Robert Tews
    3. Known scalp hair sample from Jason Gross
    4. Known scalp hair sample from Jason Gross
    5. Known scalp hair from Roger Sanderson
    6. Questioned hair sample from Stefan Zurstegge's right foot

- Margolis couriered all six (6) hair samples to the laboratory of Dr. Richard Saferstein, Ph.D., in New Jersey, U.S.A., whose test results indicated that both Robert and Roger Sandersons' scalp hair samples displayed the same physical and microscopic characteristics of the hair that was located on the victim Zurstegge's right foot.

- When considering this information, it is important to consider three (3) facts:

  1. That Dr. Saferstein's analysis corroborated Cadieux's findings and testimony with respect to the comparisons that he had made.

  2. That Dr. Saferstein's analysis did not rule out either Robert or Roger Sanderson.

  3. That the continuity of the exhibits was potentially compromised when they were turned over to Margolis for independent testing, especially when considering that there is no date recorded for when the exhibits were returned to the Court.[7]

[7] Although no date of return is recorded, Erin Magas, who was junior counsel for Margolis at the time and who is now a federal Crown Attorney, recalls returning the exhibits to the court clerk on the same day that Margolis' office received them back from Dr. Saferstein's Laboratory. Indications are that the exhibits were returned prior to the end of the trial proper on June 26th, 1997. Therefore, the conclusion can be drawn that between May 28th and June 26th, 1997 the aforementioned hair samples were not in the custody of the Court and that continuity cannot be confirmed.

Actions undertaken by the Committee

On May 17th, 2004 as a result of this Committee's contact with counsel for Kyle Unger and Robert Sanderson, both voluntarily provided Constable Rod Dahl of the R.C.M.P. with hair and blood samples. These samples were sent to the Manitoba R.C.M.P. headquarters in Winnipeg.

On June 10th, 2004 these samples along with the following were taken by Corporal Dan Barnabe to Mitotyping Technologies, LLC, 2565 Park Center Boulevard, Suite 200, State College, Pennsylvania for the purpose of post-conviction DNA analysis:

Sanderson: Exhibit # 504 – a hair located on the leg of the victim Zurstegge.

Unger: Seven (7) unknown hair samples lifted from tapings obtained by the R.C.M.P. during the investigation of the murder of Brigitte Grenier found on or about the victim. (Exhibits # 1001 and 1101-1106) Note: Exhibit #1103 was the hair originally lifted from the *Nike* sweatshirt and was matched to Unger by microscopic hair analysis.

Findings and Recommendations

Test Results

1. **Sanderson** - An examination of the hair and blood samples of Sanderson using mtDNA technology showed fourteen (14) differences between the mtDNA profile of the suspect (unknown hair Exhibit # 504) and that of Robert Sanderson. The DNA profiles derived from the hair (Exhibit # 504) and the blood sample are, without question, from two (2) different, unrelated individuals.

2. **Unger** - An examination of the hair and blood samples of Unger using mtDNA technology showed thirteen (13) differences between the mtDNA profile for six (6) of the suspect hairs (Exhibit # 1001 and #'s 1001-1105) and that of Unger and fifteen (15) differences between the remaining hair (Exhibit # 1106) and Unger. The hairs (Exhibits # 1001 and #'s 1101-1106) are not from Unger or a maternally related individual (e.g. brother or uncle).

Recommendations

1. That the cases of Robert Stewart Sanderson and Kyle Wayne Unger be referred to the Department of Justice (Manitoba) for a review of the impact, if any, that the above-noted findings may have had on the finding of guilt in either case.

2. That the reviews should be completed in a timely fashion, preferably within six (6) months of the submission of this report.

3. That the matter of Kyle Unger be reviewed first in view of the comments in the Manitoba Court of Appeal judgment of July 7, 1993 respecting the hair evidence.[8]

4. That Manitoba police services develop policy in order to ensure the permanent retention of biological exhibits in all homicide cases.

[8] See Appendix I.

Signed this 19th day of August, 2004 in Winnipeg, Manitoba.

Richard A. Saull, Chair
Forensic Review Committee

Ian Garber

Don Slough

Jean-Michel Blais

David Thorne

Norm Davison

** Unedited **

Indexed as:

R. v. Unger (Man. C.A.)

Between:

Her Majesty The Queen, Respondent, and

Kyle Wayne Unger, (Accused) Appellant, and

T.L.H. (Accused) Appellant

[1993] M.J. No. 363

Suit Nos. AR 92-30-00660 and AR 92-30-00667

Manitoba Court of Appeal

Scott C.J.M., Huband and Helper JJ.A.

Heard: April 13, 14 and 15, 1993.

Judgment: July 7, 1993.

(72 pp.)

Criminal law — First degree murder — Evidence — Admissibility — Evidence obtained by electronic means — Whether authorization made on sufficient evidence — Difference between third-party surveillance and participant surveillance — Whether the interceptions violated section 8 of the Canadian Charter of Rights and Freedoms — Whether the information had been obtained by the use of dirty tricks or unfair inducement — Charge to the jury — Error in trial judge's instructions — Severance — Whether the trial judge had erred in deciding not to allow the accused's cases to be severed — Standard for review of that discretionary decision — Whether U a compellable witness at the joint trial — Whether the decision not to sever resulted in actual prejudice to H — Whether a miscarriage of justice.

Two accused appealed their convictions of murder in the first degree. The accused U, then aged 19, and the accused H, then aged 17, both attended a rock music festival on June 23, 1990. The next day, the body of the victim, a 16-year-old high school student, was found lying in a nearby creek. She had been viciously beaten, bitten, and assaulted. The principal cause of death was asphyxiation due to strangulation, but she had also suffered heavy blows to the head which would have contributed to her death. U was acquainted with the deceased through high school. That night H and the deceased were dancing, and left together at about 1:30 a.m. H was next seen by witnesses at about 4:00-4:30 a.m. His face and clothing were muddied. There were scratches on his face and blood on his chin. H's version of events was that after he had consensual sexual intercourse with the deceased, U attacked them, and killed the victim. Both U and H were charged with first degree murder. The charge against U was stayed at the preliminary hearing. The RCMP then mounted an undercover operation in which some officers, posing as members of a criminal organization which wished to recruit U, befriended him in the hopes he would talk about the murder. U on several occasions confessed to the murder to these undercover officers. He was re-arrested and again charged with first degree murder. The accused were tried jointly, and an application for severance made on behalf of both accused was denied. H did not testify and called no evidence. U testified and claimed that his admissions to the undercover officers were lies made in the hopes of impressing these seemingly criminal types so they would offer him

employment in their organization. After a voir dire, the trial judge admitted testimony from the undercover operatives, and tape recordings of certain conversations made during the undercover operation. The trial judge did not admit video recordings made during the course of the undercover operation.

HELD: U's appeal against conviction was dismissed. H's appeal was allowed, and a new trial was ordered. U's first ground of appeal was that the evidence obtained by electronic surveillance should not have been admitted as it had been obtained under an authorization made on insufficient evidence. In dealing with this argument, the court distinguished between third-party surveillance and participant surveillance, noting that it was the latter which occurred in the present case. In participant surveillance, failure to comply with section 186(1) of the Criminal Code would not render the interceptions unlawful, due to the specific exclusion in section 184(2)(a). The court noted however, that the requirements of section 186(1) of the Code coincide with the constitutional requirements under section 8 of the Canadian Charter of Rights and Freedoms. The court was of the view that U failed to establish a breach of section 8 of the Charter. It was therefore unnecessary to consider whether or not the evidence should have been excluded under section 24 of the Charter. U's next ground of appeal was that the undercover operators gained information through the use of "dirty tricks". He alleged that the conduct of the police was such that he was encouraged to admit his guilt regardless of whether the admission was true or false, and that the tainted evidence unfairly obtained should have been excluded. The court agreed with the Crown's submission that there was no common law basis upon which U's confessions to the murder could be excluded. The right to remain silent, as guaranteed by section 7 of the Charter, simply did not apply to the facts of this case. U's third ground of appeal was that the trial judge had erred in his jury charge in several respects. The first was that the trial judge erred in failing to assist the jury in assessing the weight to be accorded to the evidence of the undercover operation and of U's admissions. In the opinion of the appeal court, this submission was without merit. While the matter could have been put more clearly, a review of the entire charge revealed that the trial judge did not unfairly review this issue with the members of the jury. The second area where the trial judge was said to have erred was in instructing the jury that U could be convicted of murder as an aider or abettor of H. Counsel for U also objected that the effect of the charge was to invite the jury to use H's statement improperly to convict U as a party. The court did not agree. The charge on aiding and abetting was purely academic, as both accused were convicted of first degree murder. Furthermore, there was ample evidence from which the jury could infer that U did not act alone, and that H was the other person involved. Dealing with the suggestion that by charging on aiding and abetting the trial judge in effect invited the jury to mix and mingle the cases against the two accused, the appeal court noted that the trial judge on seven occasions cautioned the jury about keeping to two cases separate. Both U and H had addressed the issue of whether the trials of the two accused should have been severed. The decision to allow or disallow severance is a discretionary one which should be interfered with on appeal only on demonstration of a manifest injustice. The trial judge was correct in the exercise of his discretion when he refused to grant separate trials. Turning to the H appeal, the court noted that the major submissions were that U's statement exonerating H ought to have been admitted in evidence at the behest of H, and that U should have been a compellable witness during the joint trial. This ground of appeal failed. There was no manifest injustice to H by virtue of his inability to call U to testify or to use his confessions to the undercover officers as part of his case. Counsel for H further submitted that the decision not to sever, even if correct, nonetheless resulted in a trial unfair to H, as he suffered actual prejudice from the effect of U's counsel's closing address to the jury along with errors by the trial judge. Two of the rights

constitutionally guaranteed to an accused under section 7 of the Charter came into conflict. U testified while H exercised his right to remain silent. U's counsel then attacked H's decision not to testify. Thus, U's right to make full answer and defence came into conflict with H's right to remain silent. Counsel for U left the clear impression with the jury that it was wrong for H not to testify. Had there been no joint trial, such commentary would not have been before the jury. The trial judge was precluded by section 4 of the Canada Evidence Act from advising the jurors that they were to draw no adverse inferences from H's failure to testify. H's counsel on appeal also drew the court's attention to the fact that the trial judge, in his charge, twice overstated the Crown's position on the involvement of H when the trial judge suggested that the Crown's theory was that H was involved in choking and beating the victim, and in strangling her. The appeal court was of the view that it was unnecessary to determine whether either U's counsel's address to the jury, or the trial judge's overstatement of the Crown theory regarding H's participation in the events leading to the death of the victim would necessarily have warranted a new trial. There was every possibility that, but for these errors, the verdict would have been different. The cumulative effect of the errors provided a basis for a determination that there was a miscarriage of justice.

STATUTES, REGULATIONS AND RULES CITED:

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 4(6).
Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8, 11(c), 24(2).
Criminal Code, R.S.C. 1985, c. C-46, ss. 178.11(2), 178.16(1)(b), 184, 184(2), 185(1)(e), 186, 186(1), 186(1)(a), 189, 189(1), 231(5).

H.S. Leonoff and E.J. Roitenberg, for Kyle Unger.
R.J. Wolson, B.L. Keyser and M.S. Makar, for T.L.H.
M.J. Watson and M.B. Britton, for the Crown.

PER CURIAM (dismissing Kyle Wayne Unger's appeal against conviction, allowing T.L.H.'s appeal against conviction):—

The facts

¶ 1 On Saturday, June 23, 1990, a rock music festival took place at a ski resort near Roseisle, Manitoba. The next day the nude body of the victim, Brigitte Grenier, a 16 year old high school student, was found nearby lying in a creek in a heavily wooded part of the grounds.

¶ 2 The accused Kyle Unger (Unger), then aged 19, was acquainted with the deceased through high school. The accused T.H. (H.), then aged 17, and the deceased did not know each other before that evening.

¶ 3 Both accused attended the festival separately with a group of friends. A considerable amount of drinking took place. H. began drinking at approximately 11:30 p.m. Some of his friends testified that he was drunk. Unger also consumed a considerable quantity of alcohol, as well as some LSD. There was evidence that the victim also consumed beer.

¶ 4 Around midnight H. and the deceased began to dance. Witnesses testified that they were dancing closely, kissing, fondling one another and clearly enjoying each other's company. There was evidence that Unger observed this and that during the course of the evening he expressed an interest to his close friend John Beckett in having sexual intercourse with the victim. Unger and the deceased

spoke to each other once or twice. There was a suggestion that the deceased rebuffed Unger, or at least did not seem interested in his company.

¶ 5 The deceased was last seen dancing with H. at approximately 1:30 a.m. H. and the deceased then left the dance area together and made their way to a nearby densely wooded and secluded part of the resort. Shortly thereafter Unger, upon his return from a visit to the washroom, told Beckett that he had seen the deceased, "going at it with some guy over there."

¶ 6 The music stopped around 2:00-2:30 a.m. Unger then told Beckett that he was going to "go look for some tail" (to seek sexual intercourse). The same friend who had himself been drinking was unsure exactly how long Unger was away from his sight since he slept for some time, but estimated it could have been as little as 20 or 30 minutes. Other witnesses saw Unger around a large camp-fire at approximately 3:30-4:00 a.m. They testified that he did not have any mud or dirt on his clothing, or scratches or bruises to his face. Unger left the music festival at approximately 4:30-5:00 a.m. by automobile. Considerable evidence of an inconclusive nature was given at trial whether Unger would have had time to, or did change clothing. The evidence on this point is inconclusive, given the distance to his own home (approximately 6 miles), the fact that he had no vehicle that evening and the evidence of several witnesses that be appeared to be wearing the same clothing at all times during the evening.

¶ 7 Having left with the deceased at approximately 1:30 a.m., H. was next seen by witnesses at approximately 4:00-4:30 a.m. His face and clothing were muddied. There were scratches on his face and blood on his chin. One witness noted that it appeared he had received a good beating. When asked for an explanation, H. volunteered that he had been with a girl, or had been following a girl, and had been beaten up by an unknown male and had passed out. Although he initially appeared withdrawn and unconcerned with his injuries, he later did some more drinking and conversed with friends. On leaving the area early in the morning he and a friend stopped to set fire to the contents of a barrel near the entrance to the festival area. On returning to his friend's home, H. ate a hot dog and then went to bed.

¶ 8 The victim had suffered a terrible beating. Severe blows to the head had caused subarachnoid bleeding. She had been strangled. Long sharp sticks had been forced into both her vagina and anus. These were described as having been inserted with great force. There were many other injuries about the body. There were no signs of any "defence" wounds, that is to say injuries to the victim - usually to be found on the arms or hands - indicating that she had attempted to ward off her attacker.

¶ 9 There were also bite marks found on the victim's breasts and on an arm. Dr. Norman Sperber, a forensic orthodontologist, testified that the bite marks were not made by Unger. (Unger provided specimens of his bite; H. declined to do so.) Dr. Peter Markesteyn, the provincial forensic pathologist, described the bite marks as quite superficial (meaning that the marks did not contain actual breaks in the skin), but deferred to the expertise of Dr. Sperber. Dr. Sperber testified that he had frequently seen bite marks like this in cases of violent assaults. He described the bite marks as an aggressive type of bite which would have occurred while the victim was alive and that they would have caused pain.

¶ 10 Dr. Markesteyn concluded that the large degree of bruising about the victim's head was consistent with her having been struck by a heavy stick, and that the blows to the head were likely struck with sufficient force to render the victim unconscious. She was either dead or dying when the sticks were inserted in her vagina and anus. While the principal cause of death was undoubtedly asphyxiation due to strangulation, the blows to the head "would have finished her off."

¶ 11 Forensic evidence tendered at trial demonstrated that H. had blood on his running shoes that was consistent with that of the victim. A hair found on the deceased's pants was consistent with having originated from the H.'s scalp. A pubic hair found on the deceased's socks was consisted with having originated from the pubic hair sample of H. A hair consistent with Unger's scalp hair was found on the blue Nike sweatshirt worn by the deceased.

¶ 12 Unger was one of numerous persons interviewed by the RCMP shortly after the murder. He steadfastly denied his involvement in or knowledge about the crime. After the police interview he joked (with a friend) that he was going to be charged with first degree murder.

¶ 13 H. was also interviewed by the RCMP. When first seen on the evening of June 25th, the police observed visible markings about his face and hands. No statement was taken as he was a young offender and his parents were not present. In the early morning of June 27th the police obtained the first of two formal statements from him. In this statement he admitted to having consensual sexual intercourse with the deceased, but stated that he was subsequently set upon by an unidentified male and rendered unconscious. H. described his assailant with sufficient detail for the RCMP to conclude that he was identifying Unger.

¶ 14 In the second statement made on June 29th, H. directly implicated Unger as the killer of Brigitte Grenier. He provided the police with a detailed description of Unger's murder of the victim consistent with the forensic and medical evidence. According to H., Unger, while savagely attacking the deceased, commanded H. to punch the victim a couple of times, which he did. On Unger's orders H. then assisted Unger in moving the body. H. said he did nothing further out of fear for his own safety and that he assisted Unger under duress.

¶ 15 Both Unger and H. were charged with first degree murder. H. was transferred to adult court on November 7, 1990, which transfer was upheld on appeal to the Court of Queen's Bench, and the Manitoba Court of Appeal on June 10, 1991. An appeal from the transfer to the Supreme Court of Canada was withdrawn on August 30, 1991.

¶ 16 Unger proceeded to a preliminary hearing. Prior to its conclusion the Crown entered a stay of proceedings against him on December 11, 1990.

¶ 17 Subsequent to the stay of proceedings, the RCMP learned of conversations Unger purportedly had with a number of inmates with whom he had had contact, including one Jeffrey Cohen. At trial Cohen was called by the Crown. He testified that, upon Unger's return after being advised that the charge was stayed, Unger said to him, "I killed her and I got away with it." (At trial the defence proved that on December 11th, following the stay of proceedings against Unger, he was released directly from the courthouse and never returned to his cell. There was other evidence however that on the previous the day the accused had met with one of his counsel at the Public Safety Building and he could have been advised at that time about the Crown's decision, to be formalized the next day, to stay the charge.)

¶ 18 The decision was then made to undertake an undercover operation with the objective of engaging Unger in conversations regarding the murder. On June 13, 1991, an ex parte authorization was granted by the Associate Chief Justice of the Court of Queen's Bench pursuant to sec. 186(1) of the Criminal Code authorizing the police to intercept private communications, and to that end to use any electromagnetic, acoustic or other device capable of intercepting oral telecommunications. On June 21, 1991, the Associate Chief Justice issued a new order approving, in addition, the interception of

telephone conversations, but rejecting the request for authorization of video surveillance.

¶ 19 The undercover operation commenced June 13, 1991. On that date two undercover RCMP officers staged a breakdown of their vehicle outside the hobby farm in rural Manitoba where Unger was staying. During the course of the ensuing 12 days, Unger admitted to the undercover officers that he had murdered the victim.

¶ 20 Much evidence was directed to the undercover operation dealing with the scope and planning of it, and whether as a result of the actions of the undercover officers it was so unbalanced as to be unfair.

¶ 21 Four undercover operatives in all were involved -- all RCMP officers. One officer in particular, Larry Tremblay (Tremblay), befriended Unger. The plan was to give Unger the impression that the undercover team was involved in criminal activities and to leave him with the idea that he could become part of the organization. Corporal Larry Forbes (Forbes) was cast in the role as the head of the organization. In the first week or so of the undercover operation, Tremblay established a personal relationship with Unger. He conveyed the notion that he liked Unger and that he was out to help him become involved in the organization. During this initial period, Unger on four separate occasions advised Tremblay that he had been wrongfully imprisoned for murder. No clarification was requested by Tremblay on any occasion. On June 22, 1991, Tremblay and Unger attended at Forbes' apartment. Tremblay had cautioned Unger -- who was anxious to make a good impression -- that he must be truthful. Early in the discussion Forbes said to Unger:

> Larry tells me you whacked somebody. That's fine with me. That's, that's fuckin' excellent. It's the kind of thing that, uh, I know that I'm dealing with somebody that's on my fuckin'-- somebody that I can trust... That's the kind of person I'm looking for.

¶ 22 Although Unger had told Tremblay that he wanted to talk to Forbes about the murder, he had not admitted his guilt. Notwithstanding, Unger did not correct Forbes. In this and other conversations Forbes emphasized to Unger that he had to be able to trust Unger and that, having left the impression that the undercover group was involved in an illegal activity (which Unger assumed to be drugs), he was not interested in taking into the group someone with ongoing problems with the police. Unger, initially hesitatingly and ultimately with demonstrable enthusiasm, confessed to the murder. Throughout his numerous discussions with Forbes and Tremblay, he maintained that he had acted alone.

¶ 23 On June 23, 1991, Unger, Tremblay and Forbes visited the scene of the murder. In conversations that took place between June 23rd and June 25th, Unger contradicted himself with respect to details concerning the murder, although the essential details of the beating and strangulation of the victim remained the same and were consistent with the forensic evidence.

¶ 24 Also on June 23, 1991, a conversation was intercepted between Unger and Beckett in which Unger stated that he had obtained a trusted position with a criminal organization and would be making a lot of money. He indicated that he got the job because of the reputation he had gained as a result of being charged with murder.

¶ 25 On June 25, 1991, Unger was re-arrested and charged once again with first degree murder. Shortly thereafter a direct indictment was preferred.

¶ 26 A joint trial commenced on January 20, 1992. After a lengthy voir dire the trial judge. Hewak

C.J.Q.B., ruled that the tape recordings of conversations made during the undercover operation were admissible in evidence as were the telephone intercepts, but that video tapes of certain conversations made essentially by the police for their own purposes were not admissible. Notwithstanding, the undercover operatives testified in direct examination from notes made in the normal course of their investigation although extensive reference was made to the transcripts of conversations made from the tape recordings during cross-examination. An application for severance of the trial made on behalf of both accused at the conclusion of the voir dire was denied.

¶ 27 H. did not testify and called no evidence. Unger testified. He denied any involvement in the death of Brigitte Grenier. He claimed that his admissions to the undercover officers were all lies. He testified that he admitted being involved in the murder in the hope of receiving employment and large sums of money from the illegal activities of the group. He felt that Forbes by introducing the topic of murder as he had was impressed that Unger had killed the girl and that this would increase his chances of becoming part of the gang.

¶ 28 In his final submission to the jury, counsel for Unger made an extensive attack on H.'s failure to testify.

¶ 29 On February 28, 1992, H. and Unger were both convicted of murder in the first degree. Each now appeals.

The Unger Appeal

Electronic Surveillance

¶ 30 Part VI of the Criminal Code appropriately titled "Invasion of Privacy" outlines the rules and procedures for interception of private communications.

¶ 31 Section 184 deals with the lawfulness of an interception. The general rule is that it is unlawful to wilfully intercept a private communication. Exceptions to this rule are found in sec. 184(2) which reads:

> (2) Subsection (1) does not apply to (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; (b) a person who intercepts a private communication in accordance with an authorization or any person who in good faith aids in any way a person who he believes on reasonable grounds is acting with an authorization;

¶ 32 Section 186 deals with the criteria that a judge must apply in deciding whether to grant a request for an authorization to intercept private communications. Section 186(1) provides:

> An authorization may be given if the judge to whom the application is made is satisfied
>
> (a) that it would be in the best interests of the administration of justice to do so; and
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

¶ 33 Finally, for our purposes, sec. 189 deals with the principles governing the exclusion of evidence obtained as the result of the interception of a private communication. Section 189(1) provides:

> A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made, or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof,
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

¶ 34 An understanding of the relationship between these three sections is critical to the determination of Unger's first ground of appeal.

¶ 35 Counsel for Unger argued that the recordings of conversations between Unger and the RCMP undercover officers, and the transcripts thereof, ought not to have been admitted in evidence at trial because the evidence filed before Oliphant A.C.J.Q.B. in support of the warrants did not meet the criteria for authorization under sec. 186(1) of the Code. She further argued that the issue of the admissibility of the interceptions should be exclusively determined by sec. 189(1) of the Code. Since the interceptions were not lawfully made (presumably because they ought not to have been authorized under sec. 186(1)), they were inadmissible in evidence. It was therefore not necessary nor appropriate to consider whether the interceptions were an unreasonable search and seizure and hence offended the provisions of sec. 8 of the Charter.

¶ 36 The decision whether the appropriate examination should be made under the Code, or pursuant to sec. 24(2) of the Charter (assuming a conclusion that the interceptions in question offended the provisions of sec. 8 of the Charter), is not an academic exercise. In R. v. Garofoli, [1990] 2 S.C.R. 1421, Sopinka J., writing for the majority, noted that if an interception is unlawful under the Code this finding would attract the "peremptory language" of what is now sec. 189(1) of the Code and hence this evidence would be inadmissible. In these circumstances sec. 24(2) of the Charter would not have the effect of making evidence "inadmissible by reason of some other exclusionary rule" admissible.

¶ 37 Before this Court a strong attack was mounted on the sufficiency of the information provided to Oliphant A.C.J.Q.B. to justify the authorizations in question. It was argued that the evidence disclosed in the affidavits filed in support of the request for the authorizations could not and did not satisfy the test in sec. 186(1)(a) of the Code that the interception would "be in the best interests of the administration of justice." Sufficient information was not given to determine the reliability of the material that was presented. Sufficient detail was not given of the proposed operational plan to enable a reasoned decision to be made. There were numerous examples of non-disclosure and selective editing by the police which usurped the function of the judge before whom the application for the authorization was made.

¶ 38 Both counsel agree that Garofoli, although a case dealing with the admissibility of a private conversation recorded by a third party (a third party intercept), sets forth the principles and procedure to be followed in determining the admissibility of the intercepted conversations in this case.

¶ 39 In Garofoli, Sopinka J. made it abundantly clear that when considering the admissibility of the evidence of intercepted conversations at trial, the court is in fact engaged in an exercise to determine the reasonableness of the search and seizure under sec. 8 of the Charter. However, in order to determine whether the provisions of sec. 8 of the Charter have been breached, the judge must first determine whether the provisions of the Code have been met. "This is the inevitable result of the statutory conditions being identical to the requirements of s. 8" (Garofoli, at p. 1451). This can be contrasted to a "Wilson application" which is a hearing before the issuing court "to determine the substantive or subfacial validity of the affidavit" (Garofoli, at p. 1445). Such an application precludes a review of the authorizing judge's decision that the statutory conditions had been complied with, unless grounds such as fraud or new evidence are established.

¶ 40 But a "Garofoli review" is not a hearing de novo. Sopinka J. stated (at p. 1452):

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, nondisclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

¶ 41 Substantial reliance was also placed by both counsel on R. v. Duarte, [1990] 1 S.C.R. 30, a case which, unlike Garofoli, dealt specifically with the interception of private conversations by one of the participants (participant surveillance). As it had done in Garofoli, the Supreme Court noted that the provisions of what is now sec. 186(1) of the Code coincide with the constitutional requirements of sec. 8 of the Charter. La Forest J. then went on to say (at p. 45):

> I share the approach of Martin J.A. in R. v. Finlay and Grellette, supra ((1985), 23 C.C.C. (3d) 48), at pp. 70 et seq., that this latter prerequisite imports as a minimum requirement that the issuing judge must be satisfied that there are reasonable and probable grounds to believe that an offence has been, or is being, committed and that the authorization sought will afford evidence of that offence. It can, I think, be seen that the provisions and safeguards of Part IV. 1 of the Code [now Part VI] have been designed to prevent the agencies of the state from intercepting private communications on the basis of mere suspicion.
>
> [parenthesis added]

¶ 42 The Court therefore dealt with the issue whether the evidence of the private conversations in that case were admissible as a question for consideration under the Charter. La Forest J. referred to what

is now sec. 189(1) of the Code and held (at pp. 58-59):

> That provisions it should be noted, does not make a communication admissible. If it is admissible, that is by virtue of the common law. What the provision does is to make such communication inadmissible unless its interception was (a) lawfully made, or (b) made with the consent of one of the parties to the communication. I shall deal with the second condition first. That condition was clearly met. Consent was given prior to the communication and however unreasonable reliance on such consent may have been for the purposes of Charter review, the communication is not inadmissible under s. 178.16(1)(b).
>
> The first condition poses more difficulty. Since the interception here was unreasonable within the meaning of s. 8 of the Charter, it might well be argued that it was not lawfully made for the purposes of s. 178.16(1). But I do not think the provision can be so read because what makes the interception unreasonable is the activity excepted from the application by s. 178.16(1)(b). Section 178.16(1)(a), therefore, appears to relate to other unlawfulness and, in particular, an interception that violates the prohibition in s. 178.11(2) which, we saw, does not apply to the interception in question here. The communication then is not made inadmissible by s. 178.16(1). It would thus appear admissible as relevant evidence.
>
> That being so, one must consider the question of the admissibility of the communication under s. 24(2) of the Charter.

¶ 43 The Court concluded that participant surveillance, unlike third party interceptions, will, where one party thereto consents, always be lawful by virtue of the provisions of sec. 184(2) of the Code. As noted earlier, this provision exempts such conversations from the general illegality of unauthorized interceptions of private conversations.

¶ 44 In our opinion Duarte is a complete answer to the submission of counsel for Unger. Duarte does not stand for the proposition as asserted on behalf of Unger that even in a case of participant surveillance a failure to comply with the requirements of sec. 186(1) of the Code will automatically bring into play the peremptory language of sec. 189(1) of the Code rendering the evidence inadmissible. Rather it is a matter for determination under sec. 24(2) of the Charter.

¶ 45 R. v. Lachance, [1990] 2 S.C.R. 1490, referred to by counsel for Unger, a case decided at the same time as Garofoli and which dealt with participant surveillance, is entirely consistent with Duarte and does not assist Unger.

¶ 46 Hewak C.J.Q.B. was entirely correct in his approach to the issue of the admissibility of the evidence and in his eventual decision. He correctly applied the procedure mandated by Garofoli in concluding that there continued to be a basis for the decision of the authorizing judge respecting the authorizations in question.

¶ 47 The applications for authorization made before Oliphant A.C.J.Q.B. were required not to render the interceptions legal, but to make them constitutionally valid and hence ensure the admissibility of the evidence at trial. In the case of third party surveillance non-compliance with the requirements of sec. 186(1) of the Code renders the interceptions unlawful and hence inadmissible pursuant to sec.

189(1) of the Code; see Garofoli. In the case of participant surveillance, failure to comply with sec. 186(1) does not render the interceptions unlawful by virtue of the specific exclusion in sec. 184(2)(a). If the statutory preconditions for issuance of an authorization under sec. 186(1) of the Code have not been complied with in a participant surveillance case, then, since these requirements coincide with the constitutional requirements under sec. 8 of the Charter, the interceptions will violate sec. 8 of the Charter and consideration must therefore be given to whether the evidence should be excluded pursuant to sec. 24(2) of the Charter.

¶ 48 The sole remaining question is whether the trial judge was correct in determining after the voir dire that there remained a basis for the original authorizations and therefore the requirements of sec. 8 of the Charter continued to be met. That is to say whether:

(a) a specified crime has been or is being committed;

and

(b) the interception of the private communications in question will afford evidence of the crime; Garofoli and Duarte.

¶ 49 During argument counsel for Unger essentially conceded that the alleged non-disclosures and the lack of details respecting the undercover operation would not necessarily have affected the authorizing judge's determination to issue the warrant. Hewak C.J.Q.B. therefore can hardly be criticized for determining, as he did after a lengthy voir dire, that evidence still existed to substantiate the authorizations especially since the facts before him did not diminish or contradict in any way the material in support of the authorizations.

¶ 50 The last point to be decided concerns the second constitutional requirement, namely, that interception of the private communications in question will afford evidence that a crime has been committed. In his reasons Hewak C.J.Q.B. had this to say about the application of the rule:

> On the facts of this case, in my view a more sensible interpretation of such a rule would be that the interception of private communications will afford evidence that may assist the investigation of the crime. Indeed, that kind of standard is specifically referred to in s. 185(1)(e) of the Criminal Code.

(Section 185(1) of the Code which refers to the requirements to be included in an affidavit in support of an application for an authorization refers inter alia to "reasonable grounds to believe may assist the investigation of the offence.")

¶ 51 In R. v. Finlay and Grelette [sic] (1985), 23 C.C.C. (3d) 48, the Ontario Court of Appeal defined the phrase "will afford evidence of the commission of the offence" as follows (at p. 72):

> The judge must, however, be satisfied that the granting of the authorization would be in the "best interests of the administration of justice". The language used by Parliament, as previously indicated, requires the judge to balance the interests of effective law enforcement against privacy interests and, in my view, imports at least the requirement that the judge must be satisfied that there is reasonable ground to believe that communications concerning the particular offence will be obtained through the interception sought.

¶ 52 Applying this definition, there can be no doubt but that evidence continued to exist to substantiate the authorizations; indeed, when the affidavits are examined in their entirety (and the evidence on the voir dire fully supports this), the evidence is overwhelming that participant surveillance recordings would probably afford evidence relating to the murder of Brigitte Grenier. The reference by Hewak C.J.Q.B. to a less stringent test (if indeed he applied it since he referred to the proper test in an earlier part of his reasons) is of no consequence in the circumstances.

¶ 53 Unger has failed to establish a breach of sec. 8 of the Charter. It is therefore unnecessary to consider the three-fold criteria set forth in R. v. Collins, [1987] 1 S.C.R. 265, pursuant to which the admission or exclusion of evidence under sec. 24(2) of the Charter is governed. It is sufficient to say that, if necessary, we would have had no hesitation in admitting this evidence in all of the circumstances.

¶ 54 Given this conclusion, it is not necessary to consider the Charter challenge mounted against sec. 189(1)(b).

Dirty Tricks

¶ 55 Unger submits that the undercover operation conducted against him was unfair in its implementation and design, and that all evidence emanating therefrom must be excluded. It is alleged that the conduct of the police was such that he was encouraged to admit his guilt regardless of whether that was true or false, and that both at common law (see R. v. Mack, [1988] 2 S.C.R. 903) and pursuant to secs. 7 and 24(2) of the Charter (see R. v. Broyles, [1991] 3 S.C.R. 595 and R. v. Hebert, [1990] 2 S.C.R. 151) this tainted evidence unfairly obtained should have been excluded.

¶ 56 This all stems, it is asserted, from the "grand inducement" which took place on the occasion when Unger first met Corporal Forbes, the member of the RCMP undercover team who had been characterized or described to Unger as the leader of the group engaged in criminal activities. At that meeting Forbes said to Unger:

> Larry tells me you whacked somebody. That's fine with me. That's, that's fuckin' excellent. It's the kind of thing that, uh, I know that I'm dealing with somebody that's on my fuckin'-- somebody that I can trust... That's the kind of person I'm looking for.

¶ 57 During the previous week or so, Unger had indicated on four different occasions to Larry Tremblay, the undercover officer who was his "friend" in the group, that he was not guilty of murder. Counsel argued that this inducement was so one-sided and unbalanced that justice requires that the admissions be excluded. The impression left with Unger when Forbes approved of his "whacking" somebody was that this criminal group was looking for a murderer. Unger thereupon obliged.

¶ 58 But the inducement (and the Crown readily conceded that it was an inducement) must be understood in the context of the entire undercover operation. As noted by Constable Tremblay:

> The problem we ran into in this particular investigation is the crime itself was quite gruesome. It's human behaviour, normal behaviour that you won't talk anything serious with somebody selling ice cream, for example. We were talking about a serious crime. We had to establish ourself [sic] to a level that Mr. Unger would feel comfortable discussing such a serious matter.

¶ 59 It would have been folly for the police to have moved too quickly. Unger was anxious to talk

to Forbes about the murder and asked Tremblay when he should bring up the subject. Tremblay emphasized the need to be truthful. The undercover officers were interested in developing a trusting relationship with Unger. They were not "shopping for a killer." Unger had already apparently confessed to a number of inmates and subsequently appeared to take great relish and enjoyment in describing some of the more gruesome details of murder to the undercover officers. In cross-examination Tremblay testified that he suggested to Unger the killing was an accident, "to give him every option possible to say that he wasn't responsible which in fact he denied and said, no, he was responsible."

¶ 60 While Unger, during the extensive conversations with various undercover officers which took place between June 23rd and June 25th, got a number of the details of the murder wrong, the essential features of the murder as he described them continued to be consistent with the physical evidence. That some specific descriptions were inconsistent or simply wrong is not significant in the totality of his confessions. Unger continued to insist that he alone was responsible for the murder so as to leave the impression that there were no loose ends or avenues by which the police could subsequently implicate him.

¶ 61 Mack was an entrapment case where the issue was whether the police had gone beyond merely providing an opportunity to an accused to commit an offence to the point where they had actually induced the commission of it. Lamer J. (as he then was), writing for the Court, said (at pp. 941-42):

> Ultimately, we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions. These reasons and others support the view that there is a societal interest in limiting the use of entrapment techniques by the state.
>
> The competing social interest is in the repression of criminal activity. Further, our dependence on the police to actively protect us from the immense social and personal cost of crime must be acknowledged. There will be differing views as to the appropriate balance between the concepts of fairness and justice and the need for protection from crime but it is my opinion that it is universally recognized that some balance is absolutely essential to our conception of civilized society. In deciding where the balance lies in any given case it is necessary to recall the key elements of our model of fairness and justice, as this is the only manner in which we can judge the legitimacy of a particular law enforcement technique.

¶ 62 The Supreme Court formulated a test to determine whether police activity went beyond simply providing an opportunity to commit an offence (at pp. 959-60):

> ... [t]o determine whether police conduct gives rise to this concern, it is useful to consider whether the conduct of the police would have induced the average person in the position of the accused, i.e., a person with both strengths and weaknesses, into committing the crime. I believe such a test is useful not only as an analytical mechanism that is consistent with objective analysis, but also because it corresponds to one of the reasons why the defence is thought desirable. In other words, it may be inevitable that, when apprised of the factual context of an entrapment case, members of the community will put themselves in the position of the accused; if a common

> response would be that anyone could have been induced by such conduct, this is a valuable sign that the police have exceeded the bounds of propriety. The reasoning does not go so far as to imply that the accused is therefore less blameworthy; rather, it suggests that the state is involved in the manufacture as opposed to the detection of crime.

¶ 63 Counsel for Unger recognized that it would require what she characterized as a "leap of faith" to apply Mack to the circumstances of this case. She insisted however that the inducement by the "boss" of the organization was not designed to get truthful information or to give Unger a fair choice, but to overwhelm his will and, furthermore, the trial judge's reasons for ruling that all evidence from the undercover operation was admissible were in error. He stated:

> One must wonder if that test would include the opinion of a reasonable man from the community in which the crime occurred. Should the feelings of that community or any community be ignored because the community experienced outrage, horror and indignation about the crime and towards the perpetrator? Or should we seek this reasonable man from among communities that are remote, uninformed or uninterested so that the accused could get the best interpretation of the test?

She argues that Hewak C.J.Q.B. was saying in effect that the end justifies the means which is specifically contrary to the decision in Mack.

¶ 64 We agree with the Crown's submission that there is no basis in this case at common law upon which Unger's confessions to the murder could be excluded. While the trial judge doubtless has a discretion to be exercised in appropriate circumstance to exclude evidence where the prejudicial value exceeds its probative weight, the ordinary rule is still toward an inclusionary policy. In R. v. Corbett, [1988] S.C.R. 670, the majority stated (at p. 697):

> ...[b]asic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little weight, or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion and our efforts in my opinion, consistent with the ever-increasing openness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion.

¶ 65 In Mack the Court applied a long recognized power to stay proceedings where compelling an accused to stand trial would constitute an abuse of the court's process. In that regard Lamer J. noted (at pp. 917-18):

> The concern is rather with law enforcement techniques that involve conduct that the citizenry cannot tolerate. In many cases the particular facts may constitute a classic example of what may be referred to as "entrapment" which has been described by an American judge as "the conception and planning of an offense by an

> officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." [emphasis is that of Lamer J.]

¶ 66 Reference is made by the Crown to two fundamental points, both referred to in Rothman v. The Queen, [1981] 1 S.C.R. 640. First, Martland J., speaking for five of the nine judges, said (at p. 664):

> Once it is accepted that the confession of the appellant was not made to a person in authority, it was properly admissible without any requirement for the Crown to establish that it was voluntary.

Secondly (at p. 666):

> It was not, in my opinion, a sufficient basis for the refusal of the trial judge to receive the confession in evidence solely because he disapproved of the method by which it was obtained.

¶ 67 In Rothman, Lamer J., who agreed with the majority in the result, first referred to what has become widely known as the "community shock" test. Specifically, he said (at p. 697):

> It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.

¶ 68 This test was subsequently adopted in numerous decisions as the appropriate standard in matters of this kind. Commentators have referred to the distinction as being between mere tricks on the one hand, and dirty tricks on the other. For example in Collins Lamer J., writing for the majority, said (at pp. 286-87):

> I still am of the view that the resort to tricks that are not in the least unlawful let alone in violation of the Charter to obtain a statement should not result in the exclusion of a free and voluntary statement unless the trick resorted to is a dirty trick, one that shocks the community. That is a very high threshold, higher, in my view, than that to be attained to bring the administration of justice into disrepute in the context of a violation of the Charter.

¶ 69 Courts should not be setting public policy on the parameters of undercover operations. The Crown's position, with which we agree, is that the public would endorse rather than be shocked by the efforts of the undercover agents in this case.

¶ 70 Hewak C.J.Q.B. rightly concluded that the evidence in question was admissible. We agree with his comments when he said:

> In my view on the facts of this case, the undercover officers acted in a way consistent with the need to investigate a very brutal crime. Their actions were, without doubt,

> different from the standard procedures, but they had to be given the various previous attempts made by them to investigate, bearing in mind the circumstances of the case and the lack of hard evidence. They had information that pointed in the direction they should follow and in the circumstances they devised and followed a plan that was appropriate to continue with their investigation.
>
> I find it difficult to accept that a reasonable, dispassionate person, aware of the difficulties in the investigation of this case would consider the undercover operation and use of tricks by the officers as being unfair or so unacceptable, indecent and outrageous that the evidence that was derived from that operation, if admitted as evidence in the trial of the accused, could bring the administration of justice into disrepute.

¶ 71 The Crown did not engage in dirty tricks. Their conduct, viewed in totality and objectively particularly in light of the fact that honesty was stressed by Tremblay and Forbes, would not shock the informed community. There was no unfair inducement in the circumstances; indeed, there is no evidence to substantiate this given the failure of Unger to testify on the voir dire.

¶ 72 In Hebert McLachin J. [sic] described the nature of the right to remain silent as follows (at p. 186):

> The essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to them on the other.

¶ 73 In Hebert the Court concluded that the right to remain silent extended to exclude tricks which would effectively deprive the suspect of an informed choice whether to remain silent.

¶ 74 In Broyles, at the behest of the police, a friend visited the accused, while he was in custody charged with murder, and questioned him about the killing of the deceased. The friend was wearing a body pack and secretly recorded the conversation for the police. The Court concluded the police agent had elicited the information and that in the circumstances the accused's right to silence had been violated by the course of conduct in that case. Since the accused was in the "power of the state's criminal process" (see Hebert at p. 173), the violation arose through the accused's detention.

¶ 75 Counsel for Unger submits that in this case the police conduct unfairly deprived Unger of his right to remain silent, and that since sec. 7 by its wording does not require "detention" as a prerequisite, the rationale in Hebert and Broyles is broad enough to cover a pre-detention situation.

¶ 76 In our opinion the right to remain silent guaranteed by sec. 7 of the Charter simply does not apply to the facts of this case. In Hebert McLachlin J. specifically noted that the right "applies only after detention" and went on to say (at p. 184):

> The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the Charter extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater

> power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected.

¶ 77 The reason for the delicate balance which must be maintained between the interests of the state and the interests of the individual is explained by McLachlin J. (at p. 180):

> ... s. 7 seeks to provide to a person involved in the judicial process protection against the unfair use by the state of its superior resources. On the other, it maintains to the state the power to deprive a person of life, liberty or security of person provided that it respects fundamental principles of justice. The balance is critical. Too much emphasis on either of these purposes may bring the administration of justice into disrepute -- in the first case because the state has improperly used its superior power against the individual, in the second because the state's legitimate interest in law enforcement has been frustrated without proper justification.

¶ 78 Unger was not detained at the time he made the impugned statements to the undercover agents, nor was he in the control of the state or its agents. He was not coerced against his will or tricked into making a confession.

Charge to the Jury

Undercover Operation

¶ 79 Counsel for Unger submits that the trial judge erred in his charge in failing to assist the jury in assessing the weight to be accorded to the evidence of the undercover operation and Unger's admissions. Having ruled that the evidence was admissible, it is asserted that the unfairness of the procedure was still relevant with respect to the issue of the weight to be accorded the evidence resulting from the undercover operation, and that the evidence of the inducements and promises allegedly made ought therefore to have been reviewed with the jury. It is suggested that the "common sense approach" recommended by Dickson J. (as he then was) in Vetrovec v. The Queen, [1982] 1 S.C.R. 811 (a case that dealt with accomplice evidence) is equally applicable here in that a "clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness" (at p. 831) was mandated.

¶ 80 In his brief review of the evidence of the undercover operation, Hewak C.J.Q.B. said:

> Now, much has been said and made of the fact by counsel for Unger that the undercover police operators when dealing with the accused Unger deliberately set out to get information from Kyle Unger implicating him in the killing of Brigitte Grenier, and that they used methods that counsel for Unger criticized as being unfair, dishonest, based on innuendo, inducements, false promises and so on. It may be that you're puzzled and concerned with this. Bear in mind that an undercover operation, according to the evidence of the undercover police officers, is another form of investigative technique. It is a technique that is resorted to when the normal visible police techniques have not worked.

¶ 81 It is asserted that the phrase, "It may be that you're puzzled and concerned with this"

denigrated and belittled the defence in the eyes of the jury. It is argued that this was further compounded by the trial judge when, in referring to the undercover operation, he noted:

> I suppose such tactics may not be playing by the rules of squeaky clean fairness, but is a technique that the police in certain circumstances find necessary to use.

And not saved by the direction that immediately followed:

> You will have to assess the evidence that they received in this operation to determine whether or not the information they received from Unger was in fact, as he put it, bullshit or whether it was based on fact.

¶ 82 Finally, it is suggested that the issue of reasonable doubt ought to have been put in forceful terms to the jury at this most critical point; see R. v. Sophonow (No. 1) (1984), 12 C.C.C. (3d) 272 (Man. C.A.).

¶ 83 In our opinion this submission is without merit. While the matter could have been put more clearly, a review of the entire charge reveals that Hewak C.J.Q.B. did not unfairly review this issue with the members of the jury. He stressed that the matter of weight was for them to decide. He had earlier outlined Unger's position (that his admissions were lies) and the evidence which supported that position. The impugned passages just referred to were followed by a review of Unger's theory which included his explanation for lying to the undercover police officers. Next, Hewak C.J.Q.B. gave the appropriate instructions in accordance with the decision of the Supreme Court in R v. W.(D), [1991] 1 S.C.R. 742. See as well R. v. Slobodzian (unreported, September 6. 1991), Suit No. 81/90 (Man. C.A.). At the end of his factual review the members of the jury were reminded once again that they were the sole judges of the facts and about reasonable doubt. The comments by the trial judge far from denigrating or detracting from the defence position emphasized Unger's concerns to the jury.

¶ 84 Vetrovec has no application to the circumstances of this case -- the admissions were not inherently untrustworthy. Indeed, there was evidence to corroborate them.

¶ 85 In this day and age it is an easy task for experienced counsel to pick apart a lengthy charge to the jury. This is no exception. Taken out of context, or in isolation, it is rarely difficult to mount a convincing argument concerning an alleged misdirection or non-direction. But in this case an examination of the charge as a whole convinces me that the trial judge balanced the Crown's theory with the theory of the defence. In the circumstances, the jurors could have been left in no doubt but that it was for them to assess the evidence and the weight to be attached thereto. In this regard their attention was more than adequately directed to Unger's explanation for his admissions to the police and its corresponding impact on the undercover testimony.

(ii) Aiding and Abetting

¶ 86 Counsel for Unger submits that the trial judge erred in his charge when he instructed the jury that Unger could be convicted of murder as an aider or abetter of H. Secondly, she argues that the effect of such a charge was to invite the jury to use H.'s statement improperly to assist in convicting Unger as a party. Unger was either a principal or not involved. For Unger to be convicted as a party to the offence, the Crown's theory of joint enterprise or common purpose was not viable without using H.'s statement against Unger. In order for the Crown's theory to be accepted that each accused had participated in the murder of the victim, this required and invited the members of the jury to do the very

thing that they could not do, namely, to intermingle the cases against the two accused.

¶ 87 We do not agree. Firstly, the argument as to the charge on aiding and abetting is purely academic since both accused were convicted of murder in the first degree. Furthermore, there was ample evidence, separate and apart from H.'s statement, from which the jury could infer that Unger did not act alone. The teeth marks by themselves (clearly not those of Unger) support such an inference. In addition there was the other forensic evidence, the fact that the jury could have concluded that more than one person carried the body of the victim to the creek, the condition of the victim's ripped blue jeans, and the evidence as to the general character of the victim (she was a "nice girl"). The Crown's theory put to the jury was that Unger had steadfastly insisted that he alone was involved in the murder so as to persuade the undercover agents that there was no risk of his being re-apprehended.

¶ 88 From all of this there is evidence that a jury properly instructed could conclude that Unger did not act alone and that H. was that other person.

¶ 89 Although the evidence did not make it clear what H.'s or Unger's specific involvement was, it is not essential for the jury to decide this; see R. v. Thatcher, [1987] 1 S.C.R. 652, where the Court stated (at p. 694):

> ... [if] there is evidence before a jury that points to an accused either committing a crime personally or, alternatively, aiding and abetting another to commit the offence, provided the jury is satisfied beyond a reasonable doubt that the accused did one or the other, it is "a matter of indifference" which alternative actually occurred.

Similarly, in R. v. Sparrow (1979), 51 C.C.C. (2d) 443 (Ont. C.A.). Martin J.A., writing for the Court, stated (at pp. 457-58):

> Where, on a joint trial, there is evidence that a crime was committed by two or more accused persons acting in concert, it is, of course, appropriate to charge the jury with respect to the provisions of s. 21 of the Code even though it is uncertain which accused was the actual perpetrator.

¶ 90 There can be no doubt of course, and indeed it is conceded by counsel for Unger, that where the Crown has a case against two accused as principals, it is also appropriate to proceed with a joint charge. It is certainly open to the jury to convict each as principals; see R. v. McGill (1986), 15 O.A.C. 266 at p.275.

¶ 91 In our opinion, reference to the requirement for a joint venture or common enterprise in authorities dealing with the propriety of a joint trial is not confined to situations where there was a meeting of minds or a common design. Rather, for this purpose, the evidence of joint enterprise means no more than evidence of a common criminality. The question is whether from a review of the evidence there is an indication of common participation, not a common purpose.

¶ 92 Commonality of time and space are often referred to as elements in the joinder of accused persons. In R. v. Assim (1966), 50 Cr.App.R. 224 (Court of Appeal, Criminal Division), Sachs J. noted (at p. 236):

> As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with

> each other, than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert, but it is not limited to such cases.

¶ 93 Assim was referred to with approval in R. v. Kennedy and Dowdall (1971), 3 C.C.C. (2d) 58 (Ont. C.A.). The concept of "time and space" was expanded to include "method" in R. v. Dalzell and Douglas (1979), 15 A.R. 224 (C.A.). In that case the majority held that a joint trial was proper and that the defendants were not prejudiced in their defence. Moir J.A. (dissenting in the result) wrote (at pp. 245-46):

> With knowledge as to how the trial is to proceed, insofar as the Crown is concerned, the trial judge can then hear argument on the question as to whether or not there is only one transaction, and whether the events are so close in time, space or method that they ought, in the interest of economy, be tried together.

¶ 94 The test in the United States is essentially the same, the question being whether their crimes are so closely connected "in respect of time, place and occasion, that it [would be difficult], if not impossible to separate the proof of one charge from the proof of another." Miciotto v. United States, 198 F.2d 951 (D.C.Cir., 1952). See as well Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410 (1894).

¶ 95 The Crown notes that there was an abundance of evidence from which a jury could infer that the accused engaged in a common criminal act including (for the purpose only of deciding whether to proceed with a joint trial) the statements of Unger and H., the hair fibre evidence, Unger's confession to his cell-mate and the bite marks. The Crown surmises that from the bite marks and the undercover testimony alone the jury might have concluded that both were responsible for the murder of Brigitte Grenier.

¶ 96 Since there was evidence from which the jury properly instructed could have decided the accused acted together (in the sense that their actions jointly contributed to the death of the victim) and since it was unclear as to exactly what happened, it follows that it was appropriate for the trial judge to charge the jury on aiding and abetting.

¶ 97 Dealing with the suggestion that by charging on aiding and abetting the trial judge in effect invited the jury to mix and mingle the cases against the two accused, it is significant to note that the trial judge on no less than seven occasions cautioned the jury about keeping the two cases separate. The first occasion took place when during oral testimony H.'s statements were first put before the jury; the last, well into the charge, was when he reminded the jury in specific terms that:

> Once again I wish to remind you that when you are considering the evidence in this case, you must consider all of it as it applies to each of the accused separately. You cannot simply lump it together and have it apply to both accused, particularly is this so when you consider the statements that were made to the police officers by either of the

> accused. Remember, I told you that insofar as those statements are concerned, they can only be used for or against the accused who made them. They cannot be considered for or against the other accused.

¶ 98 All that need be said on this issue can be found in the apt words of Addy J. in R. v. Lane and Ross (1969), 6 C.R.N.S. 273 (Ont. S.C.) (at p. 279):

> I feel that it is quite possible, as has been done in many cases in the past, to explain clearly to the jury, in such a way that they will govern themselves in accordance with the directions of the Judge, that the confession of one accused in a joint trial is not evidence against his co-accused. The danger of a miscarriage of justice clearly exists and must be taken into account but, on the other hand, I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it. If such were the case there would be no justification at all for the existence of juries, and what has been regarded for centuries as a bulwark of our democratic system and a guarantee of our basic freedoms under the law would in fact be nothing less than a delusion.

Severance

¶ 99 Although the question whether the trials of the two accused ought to have been severed and whether the failure to do so resulted in a manifest injustice was one of the principal issues addressed by counsel for H., it was also argued on behalf of Unger.

¶ 100 All counsel agree on the general principle to be applied, namely:

> Prima facie, accused who are jointly indicted should be jointly tried where it is alleged that they acted in concert. The ordering of a separate trial is a matter within the discretion of the trial Judge and an appellate Court will not interfere with the verdict of the jury on the ground of the refusal of the trial Judge to order a separate trial unless such refusal has resulted in a miscarriage of justice.

(See R. v. Agawa and Mallet (1975), 28 C.C.C. (2d) 379 (Ont. C.A.) (at p. 388).)

¶ 101 In R. v. Weir (No. 4) (1899), 3 C.C.C. 351 (Que. Q.B.). Würtele J. conveniently summarized the traditional grounds for severance (at pp. 352-53):

(1) That the defendants have antagonistic defences;

(2) That important evidence in favour of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial;

(3) That evidence which is incompetent against one defendant, to be introduced against another, and that it would work prejudicially to the former with the jury;

(4) That a confession made by one of the defendants, if introduced and proved, would be calculated to prejudice the jury against the other defendants; and

(5) That one of the defendants could give evidence for the whole or some of the other defendants and would become a competent and compellable witness on the separate trials of such other defendants.

The grounds outlined in Weir have consistently been referred to by trial judges when considering whether to grant an application for severance.

¶ 102 In McFall v. the Queen, [1980] 1 S.C.R. 321, three persons were accused of murder and jointly tried. All three gave contradictory statements to the police, each attempting to blame the other. The trial judge's efforts to instruct the jury that the statements given to the police were admissible only against the maker were less than satisfactory, notwithstanding the majority applied the proviso and dismissed the appeal against conviction. Estey J., writing for the minority, made the following comment which was not disagreed with by the majority (at p. 338):

> The economies and the efficiencies of joint trials and the advantage of minimizing inconsistent and unsatisfactory verdicts which expose the law and the courts to criticism by the public, attract the trial courts to the undertaking of joint trials in such circumstances: In doing so, the court takes on the added and heavy burden of complete and proper instruction to the jury on the precise limits of the evidence admissible against each of the accused, and hence the limited use to which these statements may be put.

¶ 103 Having made the order to allow or disallow severance, the decision is treated as a discretionary one to be interfered with on appeal only upon demonstration of a manifest injustice.

¶ 104 Counsel for Unger argued that substantial prejudice from the joint trial occurred resulting in a miscarriage of justice to Unger. The argument is essentially the same as that advanced with respect to the charge on aiding and abetting, namely, that since there was no evidence against Unger that would support the Crown's position of joint enterprise or joint participation, the result of a joint trial was to require the jury to consider inadmissible evidence against Unger, namely, H.'s statements. By charging the accused jointly, the jury was in effect invited to speculate since there was no evidence of a joint enterprise. In practical terms, because of the joint trial, this forced Unger into trying to blame H. for the offence which he would not have had to do in a separate trial. In the result, an injustice occurred when Unger was subject to cross-examination by counsel for H., and because Crown counsel in cross-examination of Unger put H.'s case to Unger, albeit without reference to H.'s statements.

¶ 105 The trial judge adverted to Weir in his reasons for denying the motion by both accused to sever. He then concluded:

> In the case at bar, the issues that will be facing the jury appear to me to be straightforward. There is nothing complex for them to grapple with beyond the law itself. Any risk of prejudices can be overcome by the judge properly instructing the jury and by placing all proper defences before them with a clear caution to them to disregard any and all evidence that is only applicable to one accused, not the other, or not applicable to either of the accused. It is important for a jury to be provided with the entire scenario so that they might consider and weigh all of the proper evidence and apply all the law on which they will be instructed before reaching their verdict.

¶ 106 In our opinion Hewak C.J.Q.B. was undoubtedly correct in the exercise of his discretion when he refused to grant separate trials. As noted in Grondkowski and Malinowski v. The King (1946), 31 Cr. App. R. 116 at 119, there are cases in which it can be as much in the interest of the accused as the prosecution that a joint trial take place. This is particularly so when the defence of one is duress by the other, a point emphasized later by counsel for H.

¶ 107 In R. v. Lane and Ross, Addy J. noted as follows (at p. 279):

> Insofar as the question of antagonistic defences is concerned, and the effect of a possible searching cross-examination by opposing defence counsel of either of the two accused who might wish to testify on his own behalf, I again feel that, on the facts of this case, if in fact there was no common purpose, the main issue might very well turn on who fired the fatal shots. In such a case it might very well be better for the innocent party, as well as for the general administration of justice, that the same jury hear all the evidence and be in a position to fix the guilt where it belongs. Separate trials with separate juries might very well lead to the conviction of the innocent party and the freeing of the guilty one. Again on facts of the case, should there in fact be a common intention, then I again feel that the same jury should hear the evidence. Separate trials might well lead to the conviction of the one who did not actually fire the shot and the freeing of the one who did.

¶ 108 When considering what is in the best interests of justice it is important, as stated in Grondkowski, that regard be had to more than the interests of the individual prisoner (at p. 120):

> The Judge must consider the interests of justice as well as the interests of prisoners. It is too often nowadays thought, or seems to be thought, that "the interests of justice" means only "the interests of the prisoners". If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it.

¶ 109 The only issue therefore is whether something occurred during the course of the trial itself to cause prejudice to Unger of such a degree as to result in a miscarriage of justice. In this regard, as earlier referred to, the two specific complaints made about the conduct of cross-examination are devoid of merit. It follows from all of the above that Unger's appeal against conviction is dismissed.

The H. Appeal

Hearsay

¶ 110 Counsel for H. (not counsel at trial) submitted that severe prejudice had been caused by the inability of H. in a joint trial to call Unger to testify; alternatively the trial judge should have allowed Unger's confessions to the undercover RCMP officers to be tendered in evidence on behalf of H. since the confessions were entirely to H.'s benefit. Counsel for H. recognized the general rule of many years standing that a statement by one accused is legally inadmissible for or against a co-accused, the basis being that it is hearsay; see R. v. O'Brien, [1978] 1 S.C.R. 591. But counsel says that this conservative rule should give way to the new régime now in place in Canada respecting the admissibility of hearsay evidence emanating from the Supreme Court trilogy of R. v. Khan, [1990] 2 S.C.R. 531, R. v. Smith,

[1992] 2 S.C.R. 915 and R. v. K.G.B., decided February 25, 1993. The sole concern now, it is submitted, is for reliability and a circumstantial guarantee of trustworthiness. If these are present, then the evidence ought to be admitted for its truth.

¶ 111 In Khan the Supreme Court allowed in evidence a statement made by a young child to her mother shortly after attending upon the accused doctor, tending to confirm a sexual assault. The evidence was admitted on the basis that it was necessary that the evidence be obtained in this way (the child being too young to testify at that time), and that there were circumstantial indiciae of trustworthiness. In Smith Lamer C.J.C. stated that the decision in Khan "should be understood as the triumph of a principled analysis over a set of ossified judicially created categories" (at p. 930), and that that decision "signalled an end to the old categorical approach to the admission of hearsay evidence" (at p. 933). Hearsay evidence is now admissible on a principled basis with the governing tests being the reliability of the evidence and its necessity. In K.G.B. the Court replaced the orthodox rule limiting the use of prior inconsistent statements to impeachment of the witness with a new rule permitting such evidence to be used as an exception to the hearsay rule so long as certain carefully drawn safeguards were followed. These safeguards included that the earlier statement was under oath and videotaped, and that the opposing party had a full opportunity to cross-examine the witness at trial. The Court left open the possibility of other circumstances which might disclose sufficient indiciae of reliability to justify the admission of a prior inconsistent statement as an exception to the hearsay rule.

¶ 112 Applying the new "principled analysis", it is submitted that Unger's statement exonerating H. ought to have been admitted in evidence at the behest of H. and that Unger should have been a compellable witness during the joint trial. Otherwise H. is unduly prejudiced by the joint trial since he could, it is argued, have called Unger as a witness in a separate trial.

¶ 113 But the complete answer to this interesting argument is that Unger testified during the course of the trial. At that time he denied the truth of the confessions made to the undercover officers (the truthfulness of his trial testimony was obviously rejected by the jury) and was extensively cross-examined by counsel for H. Furthermore, dealing with the admissibility of Unger's confessions, there is simply no circumstantial guarantee of reliability; indeed Unger testified at trial that the statement H. wished to rely on was false! Unger's confessions to the RCMP undercover team are inconsistent with H.'s last statement. H. indicated that Unger killed the deceased in his presence and that he assisted under duress. Unger told the undercover officers that he acted alone. H. cannot in those circumstances rely on the statement of a co-accused as being trustworthy when it is at odds with his own version of the events. In essence H. seeks to rely on an out-of-court statement by Unger, repudiated by him at trial, and at variance with his own confessions.

¶ 114 Counsel for H. argued that had there been separate trials it might have resulted in different evidence from Unger had he been called to testify on behalf of H. This is sheer speculation. As Martin J.A. observed in Agawa and Mallet (at p. 388-89):

> It is perhaps unnecessary to add that Mallet was competent to give evidence on behalf of the appellant Agawa at their joint trial if he wished to do so. The principal defences advanced on his behalf at the trial were provocation and self-defence. In such circumstances, if Mallet was unwilling to give evidence exonerating Agawa at a joint trial there is, in my view, little likelihood that evidence that would materially assist Agawa could be obtained from him on a separate trial.

¶ 115 Even more forceful comments were made by the same judge in R. v. Sternig (1975), 31 C.R.N.S. 272 (Ont. C.A.) (at p. 285):

> Counsel were, however, unable to refer the Court to any case where an appellate court has held that a miscarriage of justice had resulted from the refusal of the trial judge to order a separate trial on the application of one accused on the ground that such accused wished to call a co-accused as a witness, nor have I been able to discover such a case decided in Canada or in any of the courts of the Commonwealth.

¶ 116 As noted earlier, in Grondkowski, in deciding whether to sever or not the judge must consider the interests of justice as a whole, not just the interests of the prisoner. In this case it can just as convincingly be argued that a joint trial was very much in H.'s favour since in a separate trial Unger's statements to the police would not have been before the jury.

¶ 117 This ground of appeal fails. There was no manifest injustice to H. by virtue of his inability to call Unger to testify or to use his confessions to the undercover officers as part of his case.

Severance

¶ 118 Counsel for H. joined with counsel for Unger in arguing that his client should not have been jointly charged because there was no evidence of joint venture or common enterprise. This argument has in the immediately preceding pages already been dealt with and rejected in connection with Unger's appeal. The same reasoning applies to H.'s appeal.

Miscarriage of justice

¶ 119 It is H.'s further submission that his appeal against conviction for first degree murder be allowed on the basis that the decision not to sever, even if correct, nevertheless presented the opportunity for a trial that was unfair to him, a trial in which he suffered actual prejudice. The prejudice arose from the cumulative effect of Mr. Pinx's (counsel for Unger) closing address to the jury and errors by the trial judge. The prejudice constitutes a miscarriage of justice. He also argues that the verdict was unreasonable.

¶ 120 His final ground of appeal challenges the reasonableness of the verdict. In light of our determination of the submission alleging a miscarriage of justice it is unnecessary to address this issue.

(i) Address to the Jury by Counsel for Unger

¶ 121 In this case two of the rights constitutionally guaranteed an accused by sec. 7 of the Charter came into conflict. Unger testified at the trial while H. relied upon his right to have the Crown prove the case against him beyond a reasonable doubt. Unger's counsel then proceeded to attack H.'s decision not to testify. Thus, Unger's right to make full answer and defence came into conflict with H.'s right to remain silent. H. and Unger became adversaries in the real sense of the word. In such a case, the trial judge bears a special responsibility to maintain a balance between the co-accused's competing rights. This responsibility is especially onerous where, as in this case, a motion for severance has been dismissed.

¶ 122 Section 4(6) of the Canada Evidence Act, R.S.C. 1985, c. C-5 precludes both the trial judge and Crown counsel from commenting on the failure of an accused to testify. But there is no such restriction upon counsel for a co-accused. Indeed, even when comments adverse to an accused are made

by counsel for a co-accused, it is not open to the trial judge in his jury charge to explain that adverse inferences are not to be drawn by reason of an accused's failure to testify; R. v. Cuff (1989), 49 C.C.C. (3d) 65 (Nfld. C.A.).

¶ 123 H. submits that the balance between his and Unger's competing rights shifted adversely to him with Mr. Pinx's address to the jury. This state of affairs was made irreparable by sec. 4(6) of the Canada Evidence Act which prohibited the trial judge from commenting on H.'s decision not to testify.

¶ 124 Since Unger had testified at trial, it was open to his counsel to contrast the willingness of his client to take the witness stand with the reluctance exhibited by H. However, counsel's right to comment is not unrestricted or unrestrained. Counsel for a co-accused cannot make remarks which turn the trial into an unfair process against the accused; R. v. Naglik (1991), 65 C.C.C. (3d) 272 (Ont. C.A.) (leave to appeal to S.C.C. granted).

¶ 125 In Naglik, Morden A.C.J.O. dealt with an appeal by an accused who was convicted of aggravated assault after having elected not to testify. One of the grounds of appeal was that counsel for a co-accused was allowed to comment on the accused's failure to testify.

¶ 126 Following its own decision in R. v. Boss (1988), 46 C.C.C. (3d) 523, and the Newfoundland Court of Appeal in Cuff, the Ontario Court of Appeal held that sec. 4(6) of the Canada Evidence Act was constitutional, and that drawing attention to the accused's failure to testify by counsel for a co-accused was not improper. But Morden A.C.J.O. took pains to state that such comment could become unfair should the jury be invited to "speculate or draw unwarranted inferences." Morden A.C.J.O. stated (at p. 285):

> Before leaving this ground of appeal I should also mention that while, at least in my view, the law allows counsel for a co-accused to comment on the failure of the accused to testify, this does not mean that counsel has free rein, and accordingly, could encourage the jury to speculate or draw unwarranted inferences: cf. Cross on Evidence, 7th ed. (1990), pp. 384-6, with respect to the permissible scope in England of a trial judge's comments on the failure of an accused to testify. It is not suggested that counsel's submissions in the present case crossed the line in any respect and, in any event, I do not think that they did. The complaint is, simply, that counsel did comment on the failure of the accused to testify.

¶ 127 The Naglik case must be distinguished from the case at bar. In Naglik, on being advised by counsel for the co-accused that he intended to comment on the accused's failure to testify, the trial judge had warned counsel to confine his comments to his client's willingness to testify and explain himself as compared to the co-accused.

¶ 128 In the case at bar, no such checks were put upon counsel for Unger. In all fairness, the trial judge could not have foreseen the direction that Unger's counsel would take in his submission and thus did not forewarn him to contain his remarks or to refrain from inviting the jury to speculate. Counsel began his address to the jury in these terms:

> Members of the jury, Brigitte Grenier's killer is sitting in this courtroom. There he sits, T.H., whose lawyer I expect will have you believe that he sat and watched while Brigitte Grenier was brutally murdered.

The loudest witness in this courtroom was the silence of T.H. Why didn't he take the witness stand and try to explain to each and every one of you his conduct after he left that dance floor with Brigitte Grenier, his conduct in the face of the damning physical evidence against him? And why didn't he tell us under oath, I didn't kill Brigitte Grenier?

Members of the jury, the answer is simple. It's the same reason he didn't provide teeth samples to the police. He's afraid. He's afraid to get into that box and answer questions. And wouldn't you like to know, members of the jury, the answers to the following questions? Explain, Mr. H., why when you got back to the bonfire you gave three or four different accounts as to where you had been and what had happened. Explain, Mr. H., why you didn't run for help when you're 120 yards away from help. Explain, Mr. H., why you didn't when you got back to the bonfire, ask for help, call the police. Explain, Mr. H., why after you returned to the bonfire and Kyle Unger was there you didn't run away and hide and you didn't call for help. Explain to us, Mr. H., how you were able to sit at this bonfire after what we expect your lawyer is going to tell the jury and drink beer with friends and party; party after what his lawyer is going to tell you he witnessed. Explain, Mr. H., how it is that you're able to go with a friend to a ticket booth, light papers on fire and throw them into a barrel having fun, like teenagers have fun, mischievous fun after what we expect we're going to hear from his lawyer today he witnessed. Explain, Mr. H., how it is that you're able to sit in the back of a pick-up truck riding home, drinking beer and laughing with your friends after what we expect his lawyer is going to tell us he witnessed. Explain, Mr. H., how you were able to go home in such a good and happy mood with your stomach not turned, able to have a hot dog and a friendly chat before going to sleep.

Explain, Mr. H., because you can't, how it in fact was that you got covered in mud. How did you get that blood on your shoe consistent with that of Brigitte Grenier's? How did you get those scratches on your face? How did you get those scratches on your hands? How is it that, as we expect your lawyer is going to tell us you were beaten, you had only a couple of little, minor bruises on your face?

Members of the jury, think of that question and think of the answer you didn't get from that box. Explain, Mr. H., why you didn't provide your teeth samples so Dr. Sperber could look at them, like he did the teeth samples of Kyle Unger, the hair samples given by Kyle Unger to the police for examination, the blood samples given by Kyle Unger to the police for examination. He had nothing to hide.

Why didn't you give your teeth samples, Mr. H., so Dr. Sperber could look into your mouth the way he did Kyle Unger's the night after he flew into Winnipeg? Tell us that, Mr. H. Explain, Mr. H., where did those bite marks on Brigitte Grenier come from. Tell us that, Mr. H., we know they're not Kyle Unger's. Explain, Mr. H., why you didn't run to the police with your story, why did you wait for the police to come to you?

Members of the jury, what kind of answers do you expect

> T.H. could have given to those questions? Questions I am suggesting, members of the jury, should be running through each and every one of your minds before I even stood up to speak this morning. Because I am going to invite you to ask lots of questions in this case. [underlining added]

¶ 129 The opening paragraph of counsel's address can be described, at best, as aggressive and, at worst, as highly prejudicial and inflammatory rhetoric. Apart from this, most of Mr. Pinx's opening remarks refer only to the evidence and point to those parts of the evidence that, in the opinion of counsel, cry out for an explanation from H. However, the two underlined phrases call for speculation and invite the jury to find H. guilty for failing to testify and to explain his conduct.

¶ 130 Counsel for Unger left the clear implication with the jury that it was wrong for H. not to testify, that explanations were called for which H. was under some duty to provide, and that by remaining silent he failed to live up to that duty. He suggested that the only explanation for H.'s physical condition upon returning to the bonfire in the early hours of June 24th was his guilt and, therefore, he could not testify. He was afraid to testify because taking the oath would compel a confession of guilt.

¶ 131 Had there been no joint trial, such commentary would not have been before the jury. The fact that counsel for H. indicated to the jury that her client was under no obligation to testify and that he had provided answers for most of the questions raised in his statements to the police could not completely undo the harm done. The trial judge's confirmation to the jury that H. was under no duty to take the witness stand could also not undo the damage. As noted earlier, the trial judge was precluded by the Canada Evidence Act from advising the jurors they were to draw no adverse inferences from H.'s failure to testify. The fact that the trials were held jointly not only allowed counsel for Unger to join the Crown in prosecuting the case against H. but also enabled him to embark upon an attack that was forbidden Crown counsel.

¶ 132 In England, a trial judge is free to comment on the failure of an accused to testify, but it has been recognized that if the judge's comments create an atmosphere of unfairness, the guilty verdict may have to be set aside. The English cases provide examples of the type of comments by counsel for a co-accused that may be viewed as unfair.

¶ 133 In R. v. Bathurst, [1968] 1 All E.R. 1175, an accused was tried for murder. His defence was based upon diminished responsibility and was supported by the testimony of medical experts. The accused himself elected not to testify. The trial judge made this comment at his charge to the jury (at p. 1178):

> But common sense compels you to reflect, does it not, that while he might or might not have added a great deal to the case he has abstained from making the contribution that he might have done. You may ask yourselves why.

¶ 134 The Court of Appeal, in reasons by Lord Parker C.J., held that the comment was improper and justified setting aside the conviction for murder and substituting a verdict of manslaughter. The judge's commentary constituted an invitation to the jury to draw an adverse inference from the failure of the witness to testify (at p. 1178):

> It may be it is a matter of speculation, but it certainly looks as if the learned trial judge was inviting the answer to that question to be: well, if he did go into the witness box he would have said what he told the doctors was lies.

¶ 135 The Court went on to indicate the acceptable form of comment in a normal case where the onus is upon the Crown throughout (at pp. 1178-79):

> ...the accepted form of comment is to inform the jury that, of course, the accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that, while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness box.

¶ 136 In R. v. Sparrow, [1973] 2 All E.R. 129, Lawton L.J., for the Court of Appeal, in observing that Lord Parker's statement in Bathurst should serve only as a guideline for acceptable remarks, stated (at p. 136):

> What, however, is of the greatest importance in Lord Parker CJ's advice to judges is his reference to the need to avoid telling juries that absence from the witness box is to be equated with guilt.

¶ 137 **In Canada, Cory J.A.** (as he then was) commented in Boss, upon the inferences that may be drawn when an accused fails to testify. He stated (at p. 542):

> An accused who decides to remain silent in the face of a case presented by the Crown that cries out for an explanation must accept the consequences of that decision. An accused who remains silent cannot be said to have been penalized by the provisions of s. 4(5) of the Canada Evidence Act.

¶ 138 That case upheld the constitutionality of sec. 4(5) [now sec. 4(6)] of the Canada Evidence Act and concluded that it did not infringe sec. 11(c) of the Charter even though it prohibited trial judges from instructing juries that no unwarranted inference should be drawn from the failure of an accused to testify. While jury members are entitled to draw an adverse inference, they are not to be directed that such an inference should be drawn.

¶ 139 It is fair for counsel for a co-accused to draw to the jury's attention the fact that his client did testify and thus demonstrated that he had "nothing to hide." However, it is manifestly unfair that the action of a co-accused in testifying be turned directly against an accused.

¶ 140 R. v. Creighton, (April 6, 1993) Action Nos. C5748 and C5882 (Ont. C.A.), is also to be distinguished from the case at bar on two points. There was no request for severance. The comments made by counsel for the co-accused were mild in comparison to the remarks made by Unger's counsel. They were:

> I say to you members of the jury that an innocent man sitting in Creighton's seat would have gotten into that witness box and sworn that he was not guilty. He did not.

¶ 141 In dismissing the appeal against conviction, the Court made it very clear that the fact that

counsel for a co-accused proceeds to join Crown counsel in an attack on the accused is not grounds for overturning a guilty verdict.

¶ 142 In that case the accused had attacked his co-accused during cross-examination for failing to make a statement to police upon his arrest. Counsel for the co-accused then proceeded to attack Creighton during his submission to the jury for failing to testify at trial. Both accused persons had attempted to shift the blame for the offence to the other. The Court noted that this defence tactic was "a godsend to the Crown, but it would not by itself be enough to mandate the severance." In other words, the opportunity for a co-accused to diffuse the case against him or her by joining in the prosecution of an accused, which state of affairs can only occur during a joint trial, does not necessarily result in unfairness that demands severed trials. The Court noted that: "In exercising its constitutional right to a full answer and defence, he [the co-accused] is entitled to put his best foot forward, and the court is not entitled to prohibit that defence simply because it involves a tactic prohibited to the Crown."

¶ 143 In our view, counsel for Unger did more than distinguish his client who testified from H. who chose to remain silent. He called for the jury to speculate on H.'s reasons for failing to testify and invited the jury to draw the inference that H. remained silent because he was guilty.

¶ 144 In a joint trial, where co-accused advance antagonistic defences, it is prudent for the trial judge to direct counsel to limit his or her remarks to the jury that may be adverse to a co-accused. As the duty rests upon the trial judge to ensure a fair trial, he or she must set the acceptable boundaries for counsel's comments to the jury that may prejudice a co-accused. Failure to do so may result in reversible error.

(ii) Charge to the Jury

¶ 145 The evidence shows that H. provided the police with a series of statements regarding the events of June 23rd and June 24th. Two different versions of those events were before the jury by way of his admitted statements of June 27th and June 29th.

¶ 146 In his first statement, H. was less than forthright. He acknowledged an amorous involvement with the deceased which culminated in consensual intercourse, but denied being present at or having anything to do with her death. He stated that he lost contact with the deceased around 1:00 or 1:30 in the morning while the band was still playing, that he was attacked and beaten by an unknown male, that he lost consciousness as a result of the beating and that he did not awaken until the sun was rising about 5:30 in the morning. He did not identify his attacker but gave a description that fit Kyle Unger.

¶ 147 In his second statement, H. said that he and the deceased had finished having sex together and were in the process of dressing when Unger came upon the scene. H.'s socks were wet so he did not bother to put them on. (Investigating police found H.'s socks near where the murder took place.) He had one shoe on and was just putting the other one on when "someone came up and pushed Brigitte." H. tried to intervene but this individual, whom he recognized as Kyle Unger, turned on him pushing him down and kicking him. Unger then continued his attack on the deceased, beating her and choking her. H. said he heard Unger say to the deceased, "So you don't like me?" and the attack continued with increasing ferocity. H. says he tried to intervene again, but was again attacked by Unger and told to keep out of the matter.

¶ 148 The unrelenting attack on the deceased continued. The girl's clothes were ripped off, and

she was punched and strangled. Mercifully, it would seem that the deceased was unconscious and probably dead or dying when the most violent aspects of the assault took place. H. says he started to run from the scene but fell and Unger "put the boots to me." Shortly thereafter Unger ordered H. to come over to where the deceased was lying and strike her. H. says that he hit her twice. He was also ordered to help Unger to move the body down to the creek and he did so. He was warned by Unger not to reveal what he had witnessed or Unger would "get him." H. said he did not go to the police immediately because of fear. He was afraid of Kyle Unger and he was fearful that he himself would become implicated as a result of the mud and blood on his clothing.

¶ 149 Despite the detailed account given by H. to the police of the circumstances leading to the death of the victim, the evidence remains incomplete. When the body of the deceased was examined, there were three discernible bite marks, one on each breast and one on the right upper arm. The evidence shows the bite marks were not those of Kyle Unger. One can draw the inference to a virtual certainty that the bite marks were occasioned by H. who, unlike Unger, did not provide the experts with a sample of his bite mark in order to make comparisons with those on the body.

¶ 150 What is the significance of the bite marks? From H.'s best standpoint, they indicate the sexual activity between himself and the deceased was rougher than one might expect. At worst, the jury could infer that what might have begun as a consensual sexual encounter escalated into a sexual assault.

¶ 151 Yet H. elected not to testify, and left it to the jury to draw the appropriate inferences from this evidence.

¶ 152 The bite marks, of course, had nothing directly to do with the death of Brigitte Grenier. But Crown counsel, in his submission to the jury, relied upon parts of the last statement to advance the worst case scenario. The Crown's theory was that the activity between H. and the deceased ended as a sexual assault, and the assault was then somehow taken over and intensified on a massive scale through the intervention of Unger.

¶ 153 The bite marks may be described as the most minor of the injuries to the deceased, but they provide evidence that the jury could have used to conclude the events did not evolve exactly or at all in accordance with the statement provided by H. to the police.

¶ 154 The evidence shows that much of the police investigation in this case was predicated upon the essential truth of H.'s statement, especially in relation to Unger's involvement, but the Crown's theory of H.'s involvement did not remain constant.

¶ 155 In his opening address to the jury, Crown counsel put the theory in these terms:

> It is the theory of the prosecution that H., when he went to this area with Grenier, began what could be described, I suppose, as a necking session, if that term is still current, that some of her clothing was removed consensually; that is, the clean clothing which was ultimately thrown you will learn by Unger into the bush and that things got out of hand at that point. Thus far and no further, say the prosecution, was Miss Grenier prepared to go, that the bites are attributable perhaps to H., that at that stage Grenier began putting up a fight and it is then that Unger ... happens on them. He is looking for Brigitte Grenier. He happens on them, sees the situation and joins in. It is Unger who does the beating, the strangling and the shoving of the sticks into her body as he says in his statement to the police but it is H. who lends a hand and helps carry the body and

put it into the river.

¶ 156 Had the Crown maintained that position and the jury accepted the theory as so stated, the most that H. could have been convicted of was second degree murder. This theory of the Crown is the basis for a conviction against H. for aiding in a murder committed by Unger.

¶ 157 However, in his closing submission to the jury, Crown counsel suggested that H. was more deeply implicated than had been suggested at the commencement. He drew the jury's attention to the bite marks and suggested that they were indicative of an aggressive assault. He suggested that H.'s injuries might be attributed to a struggle with the deceased rather than a beating at the hands of Unger. The address to the jury then continued in these terms:

> I suggest to you that H. quite independently of Unger made an attack on this girl, that she fought back and at the same time Unger, who was looking for her, happened on them and he joined in. And he took over and H. didn't stop him because it was very much in H.'s interest that this girl die and she couldn't report him for the attack, could she.
>
> And as to this business he made me hit her, what did he make H. hit her with? Was it that wicked stick that had a splintered end and a big, fat squarish top, is that what he hit her with? Because how else would he describe the stick, unless he actually took it up in his hands; it was a dark night.
>
> I suggest that Mr. Unger [sic], members of the jury, was in this right up to his neck. He wanted that girl dead and he did nothing to stop it. He joined in, he helped move the body and he kept quiet about it. And when at last he couldn't, he blamed Unger.

¶ 158 Until this last speech by Crown counsel to the jury, there had been no suggestion that H. struck the deceased with a board or stick. Although H. had described the stick he states was used by Unger to beat the deceased, there is nothing in his statements to indicate that he had the stick in his hands or that "he wanted that girl dead."

¶ 159 This evolving theory of the Crown leads to H.'s attack on the trial judge's charge to the jury.

¶ 160 The learned trial judge correctly instructed the jury that first degree murder was an appropriate verdict only if the murder was "caused by" a person while committing or attempting to commit a sexual assault. If the death was "caused by" Unger, H. could not be found guilty of first degree murder unless he too caused the death of Brigitte Grenier. The learned trial judge told the jury that liability for first degree murder under sec. 231(5) of the Code is limited to the person or persons who by their own act or acts physically caused the victim's death. He went on:

> ... if you find that only one of them by his own act physically caused the death of Brigitte Grenier while committing or attempting to commit a sexual assault upon her and that the other accused was simply an aider, then you cannot find that aider to be guilty of first degree murder, however, you may find him guilty of second degree murder.

¶ 161 The medical evidence clearly put the cause of death as strangulation. Dr. Markesteyn

described the extensive injuries to the deceased's head and body and indicated that the blows to the head "could have" contributed to her death. The Crown relies on this opinion, briefly given, to involve H. in "causing" the victim's death.

¶ 162 However, it is not clear whether Dr. Markesteyn's opinion that the blows to the head which could have contributed to Grenier's death related in any way to the two blows H. admits to having struck the deceased or to the totality of the head injuries Dr. Markesteyn noted on examining the body. There is no evidence to indicate where H. "hit her twice," nor how he hit her. The injuries to the deceased's head and body are consistent with the beating Unger admitted to the undercover police officers that he had administered. Based on the medical evidence, it seems unlikely that the death (by strangulation) was caused by more than one person.

¶ 163 The trial Judge commented on the theory of the Crown on two occasions during his charge. On the first occasion, near the beginning of his lengthy charge, he stated as follows:

> The Crown takes the position that things got out of hand and that H. persisted with his sexual advances, but that Brigitte Grenier refused to go any further. Because of that, a disagreement between Brigitte Grenier and H. arose; Unger came upon the scene. The Crown says that because Unger had been earlier rebuffed by Brigitte Grenier, he became angry and began to tear the clothing of Brigitte Grenier, beat her, strangled her, and he was joined in this beating by Mr. H. and that they both beat her and then they dumped her body in the creek.
>
> The Crown says that the biting of Brigitte Grenier's breasts and the tearing off of Brigitte Grenier's clothes was a sexual assault, and that assault continued until Brigitte Grenier was choked and beaten to death by Unger and H. On that basis the Crown takes the position that both are guilty of first degree murder. [underlining added]

¶ 164 H. does not challenge the first paragraph in the above-quoted charge. However, he states that the underlined portion in the second paragraph involve H. in both choking and beating the victim, a position never advanced by the Crown and not substantiated by the evidence. The trial judge overstated the position of the Crown vis-à-vis H. and, in so doing, intermingled the evidence against the two accused. The effect of this part of the charge was to treat the individual cases against the two accused as one, to the prejudice of H.

¶ 165 Towards the end of his charge, the trial judge made the following statements:

> Basically the Crown takes the position that H. and Brigitte met, that they hit if off, that they danced the evening together, that they danced in a very intimate way and that ultimately they went off to the creek area to continue with their activities, that H. pressed in trying to continue with his sexual advances, that Brigitte Grenier refused to do so, there was an argument or a disagreement developed between them, then Unger came on the scene and because Unger had been earlier rebuffed by

> Brigitte Grenier, he became angry, began to tear the clothes off of Brigitte Grenier, beat her, strangled her, and he was joined in this beating and strangulation with H. and they both beat her and then dumped her body in the creek.
>
> [underlining added]

¶ 166 Once more, H. submits, the trial judge overstated the theory of the Crown and involved H. in the strangulation of the deceased, a position which was not advanced by the Crown. The trial judge had correctly advised the jury members that they could not convict H. of first degree murder unless they found that he had been a principal in the offence committed against the deceased. However, by erring in his repetition of the Crown's theory, the trial judge cast H. into the role of a principal.

¶ 167 While it might be possible to minimize the impact upon the jury of one overstatement by the trial judge, two such exaggerations of the Crown's theory in a long and difficult trial, in which severance had been denied, resulted in unfairness of such a magnitude as to constitute a miscarriage of justice. Although the trial judge repeatedly advised the jury that his assessment of the evidence must give way to the jury's own assessment of the facts, that direction could not erase the prejudice caused to H. by the overstatements.

¶ 168 Crown counsel correctly submits that H. could have been convicted of first degree murder based upon his statements together with the physical evidence against him, namely, the fibre and serology evidence, the bite marks and the physical condition of the body. However, it is our view that in a case where there are co-accused who advance conflicting defences, the trial judge must be especially vigilant to ensure that the case against one does not become entangled and confused with the case against the other co-accused. While it was up to the members of the jury to draw the appropriate inferences from the evidence placed before them, and while the jury was entitled to conclude that the bite marks were part of a sexual assault, it was incumbent upon the trial judge to confine his reiteration of the Crown's theory against each of the co-accused accurately and distinctly, one from the other. The jury was entitled to disbelieve H. when he alleged in his statement that he simply sat back and watched while Unger savagely murdered and desecrated the body of the victim. However, the trial judge erred in purporting to summarize the prosecution's case against H. in a way never put forward by the Crown.

¶ 169 It must be emphasized that the Crown is not bound to a particular theory or set of facts so long as prejudice is not occasioned the accused as a result of an evolving theory and so long as the evolution is consistent with the evidence. In this case, Crown counsel cannot be faulted for changing his theory on the extent of H.'s participation. H. had always been charged with first degree murder. No prejudice was caused by Crown counsel's suggesting to the jury that H. was more involved in the offence than as indicated in his statement to police or as suggested by Crown counsel in his opening address. The prejudice caused H. flowed from the erroneous characterization of the Crown's theory by the trial judge and the attendant merging of the cases against the two accused.

(iii) The Law

¶ 170 R. v. Duke (1985), 22 C.C.C. (3d) 217 (Alta. C.A.) and R. v. Hertrich et al. (1982), 67 C.C.C. (2d) 510 (Ont. C.A.) stand for the proposition that actual prejudice to an accused need not be established to support a determination that there has been a miscarriage of justice. If it is established that errors

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occurred during a trial which errors result in "the appearance of an unfair process," a new trial may be warranted.

¶ 171 Fanjoy v. The Queen, [1985] 2 S.C.R. 233, states that if prejudicial error has occurred, then a miscarriage of justice results. That case involved an improper and repetitive cross-examination by Crown counsel.

¶ 172 In the recent Supreme Court decision of R. v. Bevan, [1993] 2 S.C.R. 599 (June 17, 1993) File Nos. 22366 and 22389, Major, J. for the majority considered the applicability of sec. 686(1)(b)(iii) of the Criminal Code in light of errors made by a trial judge in her charge to the jury. He made the following observation:

> While each of the errors made by the trial judge in this case was serious in nature, it is not necessary to reflect upon whether any one of those errors, if it were the sole error by the trial judge, would have been a sufficient basis for directing a new trial. When the cumulative effect of the errors in question is considered, in my view this is clearly not a case in which it would be appropriate to apply the curative provision. In all the circumstances of this case there is a reasonable possibility that, but for the trial judge's errors, the verdict would have been different.

¶ 173 That same reasoning applies to this case. It is unnecessary to determine whether either Mr. Pinx's address to the jury or the trial judge's overstatement of the Crown theory regarding H.'s participation in the events leading to the death of Brigitte Grenier would necessarily have warranted a new trial. Suffice it to say that the cumulative effect of these errors resulted in actual prejudice to H. There is every possibility that, but for the errors, the verdict would have been different. The cumulative effect of the errors provide the basis for a determination that there was a miscarriage of justice.

¶ 174 We find support for our opinion in the very recent Ontario Court of Appeal decision in R. v. Giesecke (released June 21, 1993). In a similar fashion to the case at bar, the motion to sever the trials of the co-accused was dismissed by the trial judge. The trial proceeded and involved inflammatory and speculative comments by counsel for a co-accused. The Court found the trial judge had exercised his discretion properly in dismissing the motion to sever. However, in finding a miscarriage of justice, the judgment of the Court reads as follows:

> In our opinion, however, the closing address of counsel for the co-accused Lynch was improper and prejudicial to the appellant in many respects. It had the result, in effect, of providing a second and inflammatory Crown address prejudicial to the appellant.
>
> While we are not persuaded that the trial judge erred in refusing to grant the appellant's initial application for severance, an application repeatedly and unsuccessfully sought by the co-accused in the course of the trial, we are, however, of the view that, as events unfolded, the appellant was denied a fair trial. There was undeniable cumulative prejudice to the appellant resulting from evidence otherwise inadmissible against her but for the fact of a joint trial; from the increasingly antagonistic two defences; and most emphatically, from the closing address of the co-accused's counsel.
>
> .....

> In our opinion, the unnecessary repetition of the co-accused's position added to the prejudice caused to the appellant by the earlier inflammatory address. The trial judge specifically told the jury that the address of counsel did not constitute evidence. However, the repetition of the improper comments was not accompanied by a further caution. In the entire context, we are satisfied that the inappropriate, inflammatory and prejudicial comments of counsel resulted in a miscarriage of justice for the appellant.
>
> .....
>
> In our view, the appellant experienced severe prejudice from the combined impact of the growing inimical defences and of the uncorrected rhetoric and speculation in the jury address on behalf of the co-accused.

¶ 175 H.'s appeal against conviction is allowed. We direct a new trial.

SCOTT C.J.M.

HUBAND J.A.

HELPER J.A.

DRS/DRS/DRS

Indexed as:

R. v. Sanderson

Between
Her Majesty the Queen, respondent, and
Roger Kyle Sanderson, (accused) appellant
(Docket No. AR 97-30-03381)
And between
Her Majesty the Queen, respondent, and
Robert Stewart Sanderson, (accused) appellant
(Docket No. AR 97-30-03382)
And between
Her Majesty the Queen, respondent, and
Robert Blaine Tews, (accused) appellant
(Docket No. AR 97-30-03386)

[1999] M.J. No. 114
Docket Nos. AR 97-30-03381, AR 97-30-03382, AR 97-30-03386

Manitoba Court of Appeal
Scott C.J.M., Helper and Monnin JJ.A.

Heard: February 10, 1999.
Judgment: March 17, 1999.
(40 pp.)

Criminal law — Appeals, indictable offences — New trials — Grounds, misdirection by trial judge — Evidence and witnesses — Confessions and voluntary statements — Voir dire, waiver — Witnesses — Assessment of -- Joint or separate trials — Procedure — Charge or directions to jury — Directions regarding defences and theory of defence - Directions regarding separation of evidence against several accused in a joint trial Directions regarding expert evidence — Directions regarding credibility of witnesses — Misdirection, what constitutes.

These were appeals by the accused Tew, Robert Sanderson and Roger Sanderson from their convictions for first degree murder. The bodies of three men were found in a house. They had been stabbed and shot. Forensic evidence identified Robert Sanderson and Tew as the perpetrators. Roger Sanderson allegedly confessed his involvement to Stevenson, a drug dealer and pimp in his employ. Roger Sanderson argued on appeal that the trial judge's warning to the jury with respect to the dangers of relying on Stevenson's evidence was insufficient. He also argued that the trial judge erred in failing to find Stevenson an unsavory witness. Tew argued that the trial judge erred in not conducting a voir dire regarding the voluntariness of his statements to police, and in his instructions to the jury with respect to a police expert's opinion on fingerprint evidence. Robert Sanderson argued that the trial judge improperly failed to sever the charges, and that his warning to the jury with respect to the dangers of relying on the testimony of a second witness was inadequate. He also claimed that the trial judge failed to outline the theory of his defence to the jury.

HELD: Appeal by Roger Sanderson allowed and new trial ordered. Appeal by Tew and Robert Sanderson dismissed. The trial judge's charge to the jury with respect to Roger Sanderson lacked the clarity and sharpness required to draw attention to the risk of adopting Stevenson's evidence. While the trial judge made reference in his charge to factors which could affect the credibility of Stevenson, he failed to point out that Stevenson's evidence was crucial to the prosecution's case. While he instructed the jury on unreliable witnesses in general, he failed to refer specifically to Stevenson's evidence. His subsequent reference to his previous inadequate warning

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did not render the initial warning sufficient. Nor did his re-charge on the need for supporting evidence assist the sufficiency of the warning. The trial judge did not err in admitting Tew's statements to police without a voir dire given the evidence of an agreement between defence counsel and the Crown as to admission on the record. In any case, the evidence established that Tew's statements were voluntary. The trial judge properly reviewed the evidence of the police expert, and he did not err in his instructions to the jury with respect to how to assess his evidence. Robert Sanderson's arguments did not warrant appellate intervention. The record did not demonstrate that the trial judge erred in failing to find the second witness to be unreliable or of unsavory character. Having instructed the jury on the criteria to be used to assess credibility and reliability, the trial judge was not required to give additional instructions as to the assessment of the second witness's credibility. The decision not to sever the charges fell within the trial judge's discretion. The parts of Stevenson's evidence implicating Robert Sanderson were addressed by the trial judge when he properly warned the jury to confine their use of Roger Sanderson's confession. The trial judge correctly found that there was a benefit to be gained by having the entire matter dealt with in one trial. The trial judge made no error in his charge to the jury when he reviewed the theory of the defence. He was not required to refer to all of the evidence in support of the defence position as long as he treated the theories of the defence and the Crown in a balanced fashion.

Counsel:

W.G. Haight and J.B. Harvie, for the appellant, R.K. Sanderson.

T.J. Valgardson, for the appellant, R.S. Sanderson.

P.V. Walsh, Q.C., for the appellant, R.B. Tews.

G.A. Lawlor and T.S. Owens, for the respondent.

The judgment of the Court was delivered by

¶ 1 **HELPER J.A.**:— In the early morning hours of August 6, 1996, a triple murder took place at 319 Semple Avenue, Winnipeg, Manitoba. The victims were Stefan Zurstegge, Thomas Krowetz, and Jason Gross. Mr. Zurstegge's father discovered the bodies at approximately 8:00 a.m. and notified the police immediately.

¶ 2 Zurstegge was found in a semi-seated position on a couch in the living room, Gross was found in a back hallway off the kitchen, and Krowetz was found at the bottom of the basement stairs.

¶ 3 A thorough police investigation ensued involving well-experienced police officers. Both the exterior of 319 Semple Avenue and the interior were thoroughly combed in an attempt to locate evidence relevant to the investigation. The exterior investigation yielded an oil spot located on the driveway at 315 Semple Avenue, a neighbouring property. Samples of the oil were collected, and oil samples were taken from neighbours' vehicles and lawn-mowers as well as the vehicle of one of the accused, Robert Sanderson. The interior examination included the collection of hair and fibre evidence, blood samples, bullet casings, fingerprints, and a palm print located on the clothes dryer at the rear of the residence. Autopsies were conducted on all three victims.

¶ 4 These murders were extremely violent. Zurstegge had 34 stab wounds and had been shot twice. Gross was found to have blunt trauma injuries to the head and body and multiple stab wounds. Krowetz was shot three times and received at least three dozen stab wounds.

¶ 5 The forensic evidence identified two of the accused, Robert Tews and Robert Sanderson. The palm print which was taken from the dryer contained the blood of two of the victims and was identified as that of Robert Tews by virtue of the finger and palm print he provided to the police during his interrogation. One of the hairs found on the foot of Zurstegge proved to be similar to the hair of Robert Sanderson. The oil sample taken from the neighbour's driveway at 315 Semple Avenue was found to be similar to the oil in Robert Sanderson's 1988 black Cougar and was inconsistent with the oil from other vehicles and lawn-mowers in the area. A baseball bat with blood from the victims Krowetz and Gross was found in Robert Sanderson's car. Blood

matching that of the victim Krowetz was identified on the seat-belt of the passenger side of Robert Sanderson's car.

¶ 6 Despite the thorough and detailed investigation carried out by the identification unit of the Winnipeg Police, no forensic evidence was found which placed Roger Sanderson at the scene of the crime. The only evidence presented by the Crown which implicated Roger Sanderson in these murders was the evidence of Brent Stevenson, to whom Roger Sanderson allegedly confessed his involvement.

¶ 7 Following a joint trial before a judge and jury, all three accused were found guilty of first degree murder. They appeal their convictions.

ROGER SANDERSON'S CONVICTION APPEAL

¶ 8 Mr. Haight, Roger Sanderson's counsel at trial and on appeal, moved to introduce fresh evidence on the hearing of this appeal. He wished to introduce evidence of the disposition of the five charges that were outstanding against the witness Brent Stevenson at the time of the trial. He argued that as those charges were still outstanding at the time of trial the actual dispositions were unavailable, that had the dispositions been available the evidence would have had a substantial impact upon the jury's assessment of Stevenson's credibility, and the evidence could be determinative of the appeal.

¶ 9 The motion was heard at the commencement of the hearing, and the Court's decision was reserved. I note that Mr. Haight made no reference to the particulars of the evidence that he wished admitted during his submission. However, Crown counsel, in opposition to the application, advised the Court of the actual disposition of those five charges. He argued that the evidence of the dispositions would have had no impact upon the jury's determination of Stevenson's credibility and that therefore the evidence should not be admitted. I will return to this application later in these reasons.

¶ 10 Roger Sanderson's principal ground of appeal lay in his attack on the sufficiency of the Vetrovec ([1982] 1 S.C.R. 811) warning the trial judge gave to the jury. He argues that although the trial judge gave some warning to the jury, it was not a sharp, clear warning in compliance with the jurisprudence. He submits as well that the trial judge erred in failing to find Stevenson an unsavoury witness. Finally, he argues that the trial judge misled the jury by inaccurately referring to some of Stevenson's evidence as supportive evidence.

¶ 11 To address these issues, I find it necessary to review in detail both Stevenson's testimony and the charge to the jury.

THE TESTIMONY OF BRENT STEVENSON

¶ 12 Stevenson testified that he worked for Roger Sanderson, who was the vice-president of the organization known as the Manitoba Warriors. Stevenson sold drugs, ran prostitutes, and assaulted people for Roger Sanderson.

¶ 13 Stevenson testified that he was with Roger Sanderson at the Grant Hotel on August 5, 1996, where they were involved in a fight. The two of them proceeded from there to an illegal "booze can" at 595 Notre Dame Avenue in Winnipeg. Stevenson said the victim Krowetz was present at the booze can with another man and a woman and that during the course of the evening, he saw Krowetz and Roger Sanderson speak together at the bar. Krowetz left the establishment. Subsequently, the two co-accused, Robert Tews and Robert Sanderson, arrived at the booze can. According to Stevenson, soon after their arrival, Tews and Robert Sanderson engaged in a conversation with Roger Sanderson. Stevenson indicated he was not able to hear this conversation.

¶ 14 Stevenson testified that some time later, he was called over to the table where the three accused sat and was asked by them to "pull out some cocaine for them." He obliged and stated all four men, himself included, took part in the "coke sniffing."

¶ 15 At this point, Stevenson testified that his attention was drawn to a rifle placed on a blanket at the table. He stated that he was asked to wipe off some bullets and that there were others assisting with this task. Stevenson

admitted that he was intoxicated, that he was frightened, and that he walked away from the group. He testified that Roger Sanderson called him back, asked him if he was scared of the gun, and proceeded to point the rifle at Stevenson's chest and "clicked" the trigger. According to Stevenson's testimony, Robert Tews stood behind him at this time with a knife to his throat. Stevenson further testified that during this episode, Robert Sanderson came up to him from behind and put a gun to his head. According to Stevenson, Robert Sanderson said, "[w]e wouldn't kill you here because we'd have to kill everybody."

¶ 16 Stevenson testified that after this incident, he and the others who had helped clean the bullets were sent away from the table. He stated that he was scared and angry about the treatment he had received.

¶ 17 According to Stevenson, Robert Tews, Robert Sanderson, and Roger Sanderson continued to speak together for another 15 to 20 minutes. The noise in the bar was too loud for Stevenson to make out this conversation.

¶ 17a 1 Stevenson testified that the three co-accused left the booze can together.

¶ 17b 2 Stevenson remained at the booze can for one and a half or two hours longer, leaving for home at 8:00 a.m. to 8:15 a.m. on August 6th. He stated that he got to bed at 8:30 a.m. and slept until 10:00 that night. Shortly after wakening, he received a phone call from Roger Sanderson. According to Stevenson, Roger Sanderson advised him to watch the news and call back. Stevenson noted the report on the news of the triple murder involving Krowetz. He phoned Roger Sanderson back as requested and testified to joking around with him about the news report.

¶ 17c 3 It was Stevenson's testimony that some days later, at a party at his mother's house on Ellen Street, Roger Sanderson "pulled [him] aside and tried to tell [him] what had happened, what he had done." Stevenson stated that he did not want to listen at the time and cut Roger Sanderson off.

¶ 17d 4 A couple of days later, again at his mother's house on Ellen Street, Stevenson testified that he and Roger Sanderson had a conversation, wherein Roger Sanderson advised Stevenson that "Robert Sanderson walked into the house and capped them like it was no thing [sic]." According to Stevenson, Roger Sanderson stated that Robert Tews "threw him a knife" and "he stabbed a guy in the hallway." Stevenson testified that Roger Sanderson demonstrated how he stabbed the man in the hallway and commented "[h]e couldn't understand how come the man wound up by the couch in the living room."

¶ 17e 5 On August 17, 1996, after this alleged conversation with Roger Sanderson, Stevenson testified that he was arrested by police for careless storage of a firearm and possession of cocaine. Two different sets of officers questioned Stevenson regarding his knowledge of the murders. Stevenson did not advise the police of his alleged discussions with Roger Sanderson. He testified that everything he said to the officers on August 17th was a lie.

¶ 17f 6 On September 19, 1996, at approximately 7:20 a.m., police picked up Stevenson at his home to interview him with respect to the triple murders. During the drive to the police station, Stevenson spoke to the officers about a number of outstanding charges. He told them, "I wanted to get rid of them or something." Later that same morning, Stevenson provided a video-taped statement to the police, wherein he indicated, among other things:

> that he saw Roger Sanderson leave the booze can with Robert Sanderson and Robert Tews in the early morning hours of August 6, 1996;
>
> that sometime after that date, at a party at his mother's place on Ellen Street, Roger Sanderson acknowledged to Stevenson that he went to 319 Semple Avenue with Robert Sanderson and Robert Tews and that they passed him a knife and told him to "start doing something"; and
>
> that was all that Roger Sanderson said to Stevenson regarding 319 Semple Avenue, and, in

particular, Stevenson specifically told the police that Roger Sanderson did not say whether he did anything with the knife.

[Paragraphs 17a-17f were assigned by QL.]

¶ 18 Stevenson testified that when he made the video statement, he decided to tell the truth because he wanted to turn his life around. Despite this assertion, his most crucial evidence against Roger Sanderson was recounted for the first time to police and then to the Crown attorneys not on the video tape, but on the night before he testified at trial. Stevenson had never before told the police that Roger Sanderson allegedly called him at 10:00 p.m. on August 6, 1996, to advise him to watch the news about the murders. The first time Stevenson mentioned a second party at his mother's home on Ellen Street was the night before he testified. It was at this party that Stevenson alleges Roger Sanderson told him that he had "stabbed a guy in the hallway" and that Roger Sanderson could not figure out how the man made it to the couch in the living room.

¶ 19 On August 17, 1996, Stevenson was facing only two charges, and he lied to the police. On September 19, 1996, and at the time of trial, Stevenson had five outstanding charges pending. They were:

(a) aggravated assault and assault with a weapon arising from an incident on July 27, 1996;

(b) careless storage of a firearm and possession of a narcotic;

(c) failure to comply with conditions of recognizance by attending at a licenced premises;

(d) breach of recognizance for failure to report to bail supervision; and

(e) possession of a narcotic - cocaine.

¶ 20 Stevenson acknowledged that he and his mother were cocaine dealers and that he had been addicted to cocaine. At the time of his video-taped statement, Stevenson was in debt to his cocaine suppliers. After making the video statement, the police made arrangements to relocate both Stevenson and his mother to a city of their choosing and later provided money to them to assist them with their rent payments. Stevenson testified that upon he and his mother being relocated by police, he left his cocaine debts behind.

¶ 21 Mr. Haight points out that Stevenson spoke to police regarding their investigation of the murders on five different occasions, albeit that four of those interviews took place on two days, August 17th and September 19th. His submission is that Stevenson's statements differed every time. At trial, further details were added which were never before provided. In addition to those facts already mentioned, Stevenson, during the trial, recounted for the first time laying out cocaine for the three accused men in the booze can. For the first time he also indicated that there were other persons present who assisted in the cleaning of the bullets in the booze can.

¶ 22 Stevenson admitted to the following record of criminal convictions and sentences:

December 30, 1992 - robbery and possession of goods obtained by crime over $1,000 - six months' secure custody and six months' probation

March 30, 1994 - assault - six months' supervised probation

April 21, 1994 - possession of prohibited weapon - nine months' supervised probation and 60 hours of community service work

July 4, 1994 - trafficking in a narcotic - 20 months' supervised probation

June 27, 1995 - possession of a restricted drug - $600 fine

December 20, 1995 - trafficking in a narcotic - four months' incarceration and two years' supervised probation

¶ 23 Stevenson acknowledged in his testimony that he lived the life of a criminal. He further acknowledged that as a part of that lifestyle, he lied "most of the time."

THE CHARGE TO THE JURY

¶ 24 During the course of his charge, the trial judge explained to the jury the difference between direct and circumstantial evidence. He began with direct evidence and talked about the weaknesses of that evidence: that is, the possibility of mistake and the possibility of untruthfulness. He instructed the jury that in the case of direct evidence, it was their responsibility to make a decision on whether or not a mistake or untruthfulness existed and provided to them some criteria to assist them in determining the credibility, believability, and truthfulness of the witnesses.

¶ 25 To exemplify direct evidence, the trial judge referred the jury initially to Taisa Marunchak's testimony. She was a 15-year-old prostitute who had been sold to Robert Sanderson for $1,000 through the efforts of Roger Sanderson. He reviewed her evidence, which implicated Robert Sanderson and Robert Tews.

¶ 26 He then proceeded to discuss Stevenson's evidence as a second example of direct evidence.

¶ 27 He referred to the factors that could affect Stevenson's credibility. He noted that Stevenson was a member of a gang, that he confessed to a life of crime which involved selling drugs, running girls, and beating people up, that he lied often to protect himself, that he lied when interrogated by the police in relation to the investigation of these murders, that he had a record, and that he was facing several charges.

¶ 28 He then reviewed Stevenson's involvement with Roger Sanderson on the evening prior to and the day of the murders, his being assaulted by all three accused, and the accused's departure from the booze can in the early hours of August 6, 1996. He referred to Stevenson's contacts with Roger Sanderson subsequent to the murders and to Roger Sanderson's alleged confession to Stevenson several days after the event. The trial judge said thereafter:

> Those are examples of direct evidence that you heard in this case coming from Brent Stevenson. And there were other witnesses that gave direct evidence, as well. But that's what he said based on what he says he heard, based on what he said he saw, based on what he said he did and what others did.
>
> Now, in order to make a decision, that is, whether or not a mistake or untruthfulness is present in direct evidence, you have to decide on the credibility of the witness who has given the direct evidence of what they saw or what they heard. In the end, you may find that the witness is neither mistaken nor untruthful and accept the evidence in whole. On the other hand, you may decide that the witness was mistaken, or that the witness was untruthful, or that the witness was both of those things, and you may then accept the witness' evidence in part and reject the balance, or you may reject the witness' evidence in total.
>
> I should tell you that if you find that a witness is unreliable or untrustworthy, or is being deliberately untruthful, that fact might indicate to you that it is unsafe and dangerous to accept his or her entire evidence and that it should be viewed with great care before you accept any part of it.
>
> If you find that a witness was simply mistaken on a particular point, you may wish to examine his or her evidence in the light of other evidence that may support his or her evidence to clarify it.

> You may, however, wish to consider the lifestyle of the witnesses and their character when you are considering their reliability and credibility. For example, in considering their testimony, you may want to look for some supporting evidence from other witnesses or from exhibits, along with the tests on credibility that I have and will be suggesting to you, or such other tests of credibility as your experiences in life have taught you.
>
> When you assess the testimony of individual witnesses, assess it against the balance of the evidence; see if it finds support in other evidence that you do consider to be reliable. You, no doubt, know, from your own life experience, that even people who are dishonest may still be accurate about some things and that unreliable people may still be correct about some things. If a witness has been shown generally to be dishonest or unreliable and his or her testimony stands alone on a particular point, you should be concerned about relying on it.
>
> On the other hand, if it is supported by otherwise reliable evidence, you may choose to rely on it notwithstanding that the person is not someone on whom you would rely or depend if his or her testimony stood alone.
>
> When I say you are the judges of the facts, you should use that kind of common sense process in your fact-finding. As I said, you may want to look for other evidence that supports their version of events, either the evidence of other witnesses or any exhibits that have been filed in the case.
>
> For example, in the case of Brent Stevenson, you will recall that he testified that Roger Sanderson told him about stabbing a guy in the hallway and that he was surprised how that guy managed to get to the couch. In fact, the identification people and the police found one of the deceased on the couch. You may wish to ask: How did Roger Sanderson know that the one that he allegedly said he stabbed in the hallway was the same one that made his way to the couch? Use your common sense and reason to answer that question and help you decide if Roger was there and participated, as Brent said he was told by Roger.

(italics added)

The judge went on to discuss circumstantial evidence.

¶ 29 Towards the end of his charge, when instructing the jury on the respective theories of the defence and the Crown, the trial judge states:

> Now, insofar as Roger Sanderson is concerned, the Crown's position is that Brent Stevenson testified that Roger confessed his involvement in the killings to him. I referred to Brent Stevenson's evidence earlier in my instructions to you and I gave you a warning about his evidence when you are considering whether to accept all of it, part of it or none of it. If you do not accept his evidence, or if you have a reasonable doubt about it, you must give the benefit of that doubt to Roger Sanderson and acquit him.
>
> . . . . . .
>
> The defence position is: Brent Stevenson's evidence should not be accepted and relied on by you because he is an unreliable criminal who, by his own admission at this trial, lied to the police in the past when he was interviewed by them about this case. He admitted that he had led a life of crime involving weapons, prostitutes, assaults, the sale of drugs and so on. Brent Stevenson came forward with his story involving Roger Sanderson after he and his mother

were relocated to another city at the expense of the police and with the expectation that his outstanding charges would be taken care of.

¶ 30 Finally, in his re-charge to the jury, the trial judge gives the following direction:

> Secondly, I told you about the care that you must pay to the evidence when you are considering its reliability, that is, the evidence of Taisa Marunchak and Brent Stevenson, and I told you the test that you should apply in looking for supporting evidence and so on because you may find it's unreliable and so forth. I forgot to mention to you that if, in doing that, if you find no other support for the evidence of those witnesses, you may want to consider their reliability in the light of the fact that there was no supporting evidence of that particular aspect of their evidence. So keep that in mind when you're considering their reliability, as well.

THE APPELLANT'S SUBMISSION

¶ 31 Mr. Haight argues that the trial judge's Vetrovec warning contains the following fatal flaws:

> The trial judge failed to caution the jury on the crucial role that Stevenson's evidence played in the case against Roger Sanderson. He did not point out to the jury that the only evidence linking Roger Sanderson with the murders was the evidence of Brent Stevenson.
>
> When giving the initial warning (which I have highlighted for ease of reference), the trial judge failed to name Stevenson. He reviewed Stevenson's evidence in the context of explaining direct evidence and in instructing the jury on the assessment of witnesses generally.
>
> When giving the Vetrovec warning, the trial judge referred to all other witnesses giving direct evidence. The warning therefore lacked clarity and failed to focus the jury on the care which they were required to exercise when considering Stevenson's evidence.
>
> The trial judge did not instruct the jury that they must view Stevenson's evidence with care. Rather, he said they should review the evidence of an unreliable witness with care.
>
> The trial judge's re-charge was an insufficient attempt to cooper up the Vetrovec warning and was not sufficient to patch up an inadequate direction to the jury on their treatment of evidence from an unsavoury witness.
>
> He failed to identify Stevenson as being a disreputable witness or a witness of unsavoury character. He erred in leaving to the jury the determination whether Stevenson was an unsavoury witness.
>
> When directing the jury on an example of supporting evidence (the second highlighted portion of the charge), the trial judge quoted Stevenson's evidence incorrectly. Stevenson had testified that Roger Sanderson could not understand how the victim he stabbed in the hallway ended up "by the couch" in the living room. The trial judge used the phrase "to the couch." He thus misled the jury with that inaccurate quotation and prejudiced Roger Sanderson.
>
> Counsel elaborates on the preceding point and argues that the above-noted evidence could not constitute evidence supportive of Stevenson's testimony because there were several media

reports on the location of the victims in the house. Thus, those present at the murder did not have exclusive knowledge of this information.

THE LAW

¶ 32 Dickson J. (as he was then) noted in Vetrovec, at p. 831, that because of the infinite range of circumstances which will arise in a criminal trial process, "it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness." Rather, what is required is a "clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness."

1 In R. v. Yanover and Gerol (1985), 20 C.C.C. (3d) 300 (Ont. C.A.), the court, at p. 321, reviewed the Vetrovec warning given by the trial judge early in his charge:

> Mr. Moon testified at very great length. Your assessment of him and his testimony will be crucial, I think, to your deliberations and your ultimate decisions.

The trial judge then went over the witness's background and continued:

> In my view, all that must cause you to be careful and thorough as you consider Mr. Moon the man, the witness, and his testimony. How does his testimony stand up when viewed in the light of everything else in the trial? Is there any other evidence, or circumstance which bolsters his credibility in your eyes? Is there any other evidence or circumstance which diminishes his credibility in your eyes?

He went over the fact that Mr. Moon was a sentenced accomplice and was presently serving a sentence. The next morning, the judge resumed his charge as follows, at p. 322:

> Firstly - because I am sure you share with me and with counsel the view that Mr. Moon's evidence is very crucial in this particular trial - I want to repeat to you, in essence, something that I said yesterday, and that was to the effect that Mr. Moon's evidence does occupy a central position in the presentation of the Crown case, but, also, you have to bear in mind that he, himself, has been convicted of the particular offence which is referred to in count one of the indictment, and, also, I suppose, indirectly in relationship to counts two and three as well - to some degree. And, I also think you will probably share the view expressed that he has been an unsavoury or disreputable character. And, it is for those reasons that I am repeating my instructions to you today: that you must view his evidence with a great deal of care.

¶ 33 At p. 324 of the appeal decision, Martin J.A. set out the four propositions that flow from Vetrovec:

> It is within the discretion of the trial judge, depending upon his view as to the trustworthiness of the witness, whether to warn the jury as to the risk of convicting, without more, on the testimony of a witness whose evidence occupies a central position in the proof of guilt, but who may be suspect by reason of being an accomplice or a person of unsavoury character.
>
> There may be cases where common sense requires something in the nature of confirmation of the testimony of an accomplice or a witness of unsavoury character whose evidence is central to proof of guilt, and, in those circumstances, it is appropriate to give to the jury a clear and sharp warning as to the risks of adopting, without more, the testimony of such a witness.
>
> Where the judge decides that such a warning is called for he should assist the jury by drawing

> to their attention by way of illustration an item or items of evidence which they may draw upon as confirmation of the witness's evidence, but he is not under the same mandatory obligation that existed prior to Vetrovec to detail exhaustively "the evidence" capable of supporting the evidence of the accomplice.
>
> Where the judge decides that a warning is required as to the need for caution with respect to the evidence of a witness, the direction need not be compressed into a particular formula, nor expressed in a particular form of words.

¶ 34 The appellant's argument in that case was that the trial judge failed to give a sharp, clear warning; that he merely instructed the jury to consider Moon's evidence carefully, but did not signal caution with respect to the risks of adopting, without more, his evidence. Martin J.A. rejected that submission. He found the instructions emphasized the central position that Moon's evidence occupied in the trial, his unsavoury background, and the fact that he had been convicted of causing the explosion.

¶ 35 In R. v. Bevan, [1993] 2 S.C.R. 599, Major J. wrote for the majority and arguably found favour with the dissenting reasons of Osborne J.A. in the Ontario Court of Appeal ((1991), 63 C.C.C. (3d) 333), where, at pp. 361-62, Osborne J.A. stated:

> However, in those cases where a clear sharp warning is required, it seems to me that it is of fundamental importance that the form of the warning take into account that its underlying purpose is to direct the jury's special attention to the risk of convicting an accused on the basis of the evidence of a witness who may be viewed, for reasons such as self-interest, as untrustworthy. Thus, the witness should be singled out, that is, separated from the pack. The jury should be told to scrutinize the evidence for evidence which would confirm or support the testimony of the witness who is said to have a motive to lie, or who is of unsavoury character. ... In my view, it is preferable in most cases that the trial judge tell the jury why the evidence of a given witness requires special scrutiny, that is, why the light of the credibility microscope should be turned up.

(italics added)

Major J., in overturning the Court of Appeal decision, acknowledged that the Vetrovec case stands for the proposition that a trial judge has a discretion to determine whether the evidence of any witness is for some reason untrustworthy to such an extent that a warning to the jury is necessary. He points out, however, that although a Vetrovec caution to the jury is not required in all cases, there are some cases in which the circumstances may be such that the caution must be given.

¶ 36 In R. v. Lee, [1998] B.C.J. No. 2283, the British Columbia Court of Appeal, on September 17, 1998, confirmed the following charge by the trial judge, at para. 16:

> I want now to give you a special direction that I am required to give you with reference to the evidence of Alan Ng, Aaron Cook and Jason Marshall. They are all persons who may well be characterized as persons of an unsavory character and as accomplices. Through their own evidence these witnesses demonstrated that they participated in the planning and deliberation of the killing of Jian Bian. The defence has also listed many points and circumstances which go to their general credibility.
>
> Now, there is a special warning I must give you. You should be extremely cautious in accepting the evidence of Alan Ng, Aaron Cook and Jason Marshall and it is unsafe for you to rely on such evidence standing alone.

¶ 37 Mr. Haight directed the Court to another British Columbia Court of Appeal decision as an example of a "clear and sharp" warning to the jury. R. v. Fowler, [1999] B.C.J. No. 96, was released January 22, 1999. In that case, the substantive issue was the failure of the trial judge to refer to supporting evidence after providing the Vetrovec caution. The only witness against the accused was a person who had an equal opportunity to commit the offence. After reviewing the evidence which led the trial judge to making the determination that the witness was of "unsavoury" character, he charged the jury in part as follows, at para. 24:

> You must be extremely careful and cautious in accepting his evidence. I will repeat that. You must be extremely careful and cautious in accepting March's evidence. As I said to you earlier, the question of credibility is entirely for you to decide. You may find after weighing all the evidence that Mr. March was believable in the material aspects of his evidence. Again that is a matter for you to decide, but I must warn you to be very, very careful about his evidence.

¶ 38 Despite the failure of the trial judge to review supportive evidence, the appeal was dismissed. The charge was found to be adequate and in fact favourable to the accused. The trial judge appeared to have concluded that there was no other independent evidence that supported the unsavoury witness. The fact that the Court of Appeal did find evidence supportive of the testimony of the unsavoury witness weighed against the appellant's submission.

¶ 39 Mr. Haight relies on R. v. Watkins (1992), 70 C.C.C. (3d) 341 (Ont. C.A.), to support his submission that the trial judge erred in failing to make the determination that Stevenson was a witness of unsavoury character and in leaving that issue to the jury for determination.

¶ 40 The trial judge in that case gave the jury the following Vetrovec warning, at p. 343:

> If you come to the conclusion that Rupert Jarvis is an unreliable witness, after reviewing the evidence, and again that is entirely up to you on your review of the witness, then his evidence should be scrutinized and weighed with great care. I must warn you that it is dangerous for you to act on the evidence of such a person unless corroborated.

¶ 41 The Court of Appeal concluded that the trial judge should not have left it to the jury to determine whether Jarvis was of unsavoury character. That issue was a matter of law to be determined by the trial judge.

THE DECISION

¶ 42 The trial judge in the case at bar was aware of the issue of credibility and made reference to factors which could specifically affect the credibility of Stevenson. However, he did not point out to the jury the fact that Stevenson's evidence was crucial to the Crown's case against Roger Sanderson. He did not point out that Stevenson's evidence was the only evidence implicating Roger Sanderson in the murders. His initial reference to Stevenson's evidence is found in that section of his charge where he is explaining direct evidence to the jury, the weaknesses in direct evidence, and the general criteria for determining the reliability of witnesses. He did not give a warning in addition to instructing the jury on credibility. He did not convey to the jury a clear, sharp caution on their use of Stevenson's evidence.

¶ 43 There is no question that the trial judge instructed the jury on unreliable witnesses and that later in his charge, he referred to the warning he had given the jury on his evidence. However, in his initial caution, he did not refer specifically to Stevenson's evidence or mention Stevenson's name. He did not separate Stevenson's evidence "from the pack." His later reference to his previous inadequate warning cannot render the initial warning "clear and sharp" in accordance with the jurisprudence. And his re-charge on the need for supporting evidence does not assist the Crown's argument on the sufficiency of the warning when reviewing the charge as a whole.

¶ 44 I am of the view that the charge lacked both the clarity and sharpness required by Vetrovec to attract

the attention of the jury to the risk of adopting Stevenson's evidence.

¶ 45 Additionally, I agree with Mr. Haight's submission that as a matter of law, it was for the trial judge to determine that Stevenson was an unsavoury witness. Given my determination of the first two issues, I find it unnecessary to analyze Mr. Haight's argument on the trial judge's inaccurate reference to supporting evidence. I would allow the appeal against conviction.

¶ 46 I return to the application for fresh evidence. I have determined that the application should be granted and the new evidence admitted. That evidence shows that Stevenson was dealt with leniently by the courts.

¶ 47 Mr. Haight urges this Court, in granting the conviction appeal, to acquit his client. He argues that the new evidence supports his contention that Stevenson in all likelihood made a deal with the Crown to give evidence at trial against his client in exchange for leniency. He submits that no jury properly instructed could convict Roger Sanderson on the basis of Stevenson's evidence.

¶ 48 I do not agree. I would allow the appeal and order a new trial.

ROBERT TEWS' CONVICTION APPEAL

¶ 49 Mr. Walsh (who was not counsel at trial) raises two grounds of appeal on behalf of Robert Tews. On the first ground, he argues that there was no voir dire conducted at trial to determine the voluntariness of statements made by Tews to the police during the course of the murder investigation. The record does not disclose an express waiver by Tews' counsel of the need for a voir dire or an express acknowledgement by his trial counsel that all statements made by Tews to police were voluntary.

¶ 50 Mr. Walsh argues that the Crown is under an obligation to prove on the record the voluntariness of an accused's statement either by consent or on the evidence. In this case, there is no indication on the record that counsel consented to the admission of the conversations Tews had with the police during his interrogation. He contends that none of the evidence adduced by the police during the course of their interviews of Tews should have been before the jury, including the fingerprint evidence. Without the fingerprint evidence taken during the interrogation, there is no evidence identifying Tews' palm print at the scene of the murder. Therefore, there is no evidence to support the finding of guilt of first degree murder.

¶ 51 There is no merit to this ground of appeal.

¶ 52 In Korponay v. Attorney General of Canada, [1982] 1 S.C.R. 41, the Supreme Court had the following to say at p. 49: As a general proposition, I should like to restate here what was said by our brother Dickson J., speaking for the Court, in Park, [[1981] 2 S.C.R. 64]. He was of course speaking of the waiver by counsel of a voir dire [at pp. 73-74]:

> No particular words or formula need be uttered by defence counsel to express the waiver and admission. All that is necessary is that the trial judge be satisfied that counsel understand the matter and has made an informed decision to waive the voir dire. [ ] Although no particular form of words is necessary the waiver must be express. Silence or mere lack of objection does not constitute a lawful waiver. The question is - does the accused indeed waive the requirement of a voir dire and admit that the statement is voluntary and admissible in evidence? If that question can be answered in the affirmative I cannot think that any further procedural safeguards are necessary to protect the rights of an accused person.

Other factors to be taken into account, as highlighted by the Court, are whether or not the accused is represented by counsel, counsel's experience, and the practice that has developed in the jurisdiction where the events are taking place.

¶ 53 In this case, all those factors weigh against the appellant's submission. There were three different

accused, represented by a total of five experienced defence counsel. There were two Crown prosecutors and a seasoned trial judge. Additionally, the record itself demonstrates counsel's acquiescence in the admission of this evidence.

¶ 54 In support of his own client's appeal, Mr. Haight filed for this Court's consideration a supplementary appeal book that contained a copy of the pre-trial conference memorandum completed by the trial judge in this case. Under the heading "Voir Dire" in that document, the following questions are posed and answers given:

> 14. Voir Dire:
>
> a. Are there any confessions or statements of the accused to be tendered in evidence? Yes.
>
> b. Will a voir dire be required? Yes, to deal with confessions or statements of the accused to persons other than the police, depending on how these witnesses testify.

(italics added)

That pre-trial conference memorandum was sent to all counsel.

¶ 55 The record shows that during the course of the witness Buck's direct examination, the jury was excused. Tews' trial counsel then entered into the following discussion with Crown counsel:

> MR. MINUK:....
>
> My understanding is that the witness wasn't involved in the taking of the print and, in as much as at the end of the day, in a criminal trial, where the accused makes a statement, irrespective of what the police may have to say about whether or not it's voluntary or not, all the man did was read from police paper. We don't know anything at all about the circumstances in which that print was given and it's quite misleading, with all due respect. In the absence of any examination or some background put, the jury is simply left with this man's reading of that document, to have the jury conclude automatically, because the signature is on it, no different than a signature might be on a statement, that the circumstances surrounding the delivery of whether it's a fingerprint or written, or rather, oral remarks reduced to writing, are voluntary.
>
> **THE COURT**: So you're requesting, I take it, that the person who took the print should be called?
>
> MR. MINUK: That's correct.
>
> MR. DANGERFIELD: I'm taken by surprise because yesterday my friend advised he didn't need any voir dires with respect to utterances by his accused.
>
> THE COURT: Well --
>
> MR. MINUK: It's not about utterances.

(italics added)

¶ 56 Mr. Walsh submits that Mr. Minuk's reference to "utterances" refers only to utterances by Tews in relation to his fingerprinting.

¶ 57 I reject that submission. It is illogical to read the exchange between Mr. Minuk and Mr. Dangerfield so restrictively in light of the numerous police witnesses who testified regarding Tews' interrogation. At no time during the entire trial was there any question by any of the five defence counsel on the voluntariness of statements

made by their respective clients to the police. My interpretation of the above exchange is that counsel had agreed with the Crown to admit all statements made by Tews to the police.

¶ 58 A la ter exchange between Mr. Haight, Mr. Dangerfield, and the trial judge supports this conclusion; that is, that there was an agreement between defence counsel and Crown counsel that the accused's statements to the police would be admitted without the need for a voir dire. Mr. Dangerfield states during the course of this later exchange:

> If this were a contest of whether the statement should be put in evidence at all, that is the entire statement, whether it was fairly taken, according to rules governing the admissibility, that argument might have some weight. All this is is an interview.

Mr. Dangerfield goes on to explain to the trial judge:

> This is a statement made by a man that my friends say is admissible in evidence. They want it here.

Later he states (he's referring to inaccuracies in the statements made by police):

> So you were at the murder scene. That's our position. Is that to be excluded because there's no evidence of it? I mean, these are statements being put by police officers to see what the responses would be. If my friends didn't want this statement in, they should have challenged it as being involuntary. Then none of it would be there. But instead, they want some of the evidence because it provides him with a defence. What they don't want is evidence of questions being put which he denies because they somehow fear the jury will act improperly on it. He only is -- they're only allowed to consider what he actually accepts.

¶ 59 Mr. Walsh asks this Court to conclude that despite Mr. Dangerfield's references to defence counsel's desire to have parts of Tews' statements to police admitted in evidence, and despite an indication that defence counsel was not challenging the voluntariness of the statements, the trial judge erred in failing to conduct a voir dire prior to admitting those statements. I reject that submission as being utterly without merit.

¶ 60 Even if it could be argued that the Crown failed to prove on the record the consent to the admission of the statements or the waiver of a voir dire, the record itself demonstrates that all statements made by Tews were voluntary. The evidence is that the police advised Tews of his rights at the commencement of each interview, that during the course of or between interviews Tews had spoken to his lawyer, that he gave the fingerprint evidence contrary to the advice of his lawyer, that there was no coercion, and that he continually denied his involvement in the murders. None of the officers who had interrogated Tews were cross-examined on the voluntariness of the statements he made or on circumstances surrounding the taking of the fingerprint evidence.

¶ 61 Detective Sergeant David Thorne was the first police officer who testified regarding his contact with Tews. He described the initial interrogation of Tews.

¶ 62 He and Sergeant McQuat began their interrogation at the Public Safety Building in the early hours of August 7th. Between themselves, they had decided that Sergeant McQuat would ask the questions and that he would record the conversation. Together they entered the interview room where Tews was being detained and introduced themselves. Sergeant McQuat advised Tews that he was under arrest for the murder of three people and named those persons. Tews was not charged at that time, but placed under arrest for investigation purposes. Sergeant McQuat then advised Tews of his right to counsel and asked him if he understood what he had been advised. Tews responded that he had a lawyer, Sheldon Pinx. Sergeant McQuat then asked Tews if he wanted to call his own lawyer, and he responded in the negative. He then advised Tews of his right to silence. Sergeant McQuat proceeded to ask Tews questions, which Tews answered. In the course of that interview, Tews denied involvement in the murders. He was asked for hair and blood samples and refused to give them.

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¶ 63 Following this initial interview, Tews was left alone for approximately ten minutes. In the second interview, the officers changed roles. Thorne conducted the second interview, and McQuat recorded the questions and answers. Prior to Thorne's referring in his testimony to the notes taken by him, defence counsel was asked if there was any problem with Thorne's referring to those notes. The record indicates no objection by counsel.

¶ 64 After the second interview, Tews was left alone for approximately one hour, and then the police returned to the interview room to continue the interrogation. Thorne continued to ask the questions, and McQuat recorded the questions and answers. During the course of that interview, Tews was shown Robert Sanderson's blood samples, and he agreed to give samples himself. Thorne took the samples. Tews also gave a hair sample and agreed to take a gun-shot residue test. Between 6:30 a.m. and 7:30 a.m., Thorne and McQuat reviewed Robert Sanderson's account of his activities on August 6th, and at 7:50 a.m., they returned to the interview room. The next interview lasted approximately 28 minutes. At 11:15 that morning, Tews called Mr. Pinx. At noon, Mr. Pinx arrived to consult with Tews. At 9:40 that evening, Tews was released pending further investigation.

¶ 65 Thorne's next contact with Tews was on August 10th. He and McQuat pulled over the car in which Tews was a passenger, arrested him, took him into custody, and proceeded to the Public Safety Building, where he was turned over to another team of officers for an interview.

¶ 66 The next police officer to testify was Detective Sergeant Robert McQuat. McQuat's evidence confirmed Thorne's description of the initial interviews with Tews on August 7th. That confirmation included the explanation given to Tews that he could call his lawyer at any time, his declining that offer, the reminder that he was not bound to say anything and that anything he did say could be taken down in writing and used as evidence, and his willingness to answer questions.

¶ 67 McQuat and Thorne returned to the interview room at 5:18 a.m. and again asked Tews for hair and blood samples. The evidence indicates that Tews was told Robert Sanderson had provided a blood sample. However, there was no coercion or pressure placed upon Tews to do the same. Tews asked if he could see Robert Sanderson's blood sample. McQuat and Thorne left the interview room, obtained the blood sample which they were led to believe came from Robert Sanderson, returned to the interview room, and showed Tews Sanderson's signature. When he was shown the sample, he agreed to provide his own.

¶ 68 Prior to taking the sample, Thorne explained to Tews that he did not have to give the samples, he could call his lawyer before giving those samples, and was asked if he wanted to call a lawyer. Tews answered in the negative. He was also advised that the samples could be used as evidence in court. Tews responded that he understood this. The samples were then provided. Tews then requested another glass of water and a cigarette, and he was left alone at 5:44 a.m.

¶ 68a 1 Another interview began at 7:50 a.m. on August 7th. Tews was initially asked if he wanted anything, and he asked for more water and a cigarette. He was reminded that he was under arrest for murder and that he could call his lawyer. He indicated he did not want to make a phone call. He was again advised that he need not say anything, but anything he did say could be used in evidence. He indicated he understood that. He was asked a series of questions, and he responded to those questions. He was left alone again at 8:18 a.m. At 11:15 a.m., he asked to call his lawyer, and as indicated by Thorne, and confirmed by McQuat, Mr. Pinx arrived to see Tews at around noon on August 7th.

¶ 68b 2 McQuat's notes confirmed Tews' re-arrest on August 10th, when the car in which he was a passenger was stopped and he was taken into custody. Upon his second arrest, he was reminded of his right to counsel and his right to silence. Counsel on behalf of Tews, on cross-examination of McQuat, did not challenge him on the voluntariness of the statements made by Tews.

¶ 68c 3 The third police officer to testify was Detective Sergeant Loren Schinkel. He became involved with the investigation on August 10th, 1996, together with his partner, Detective Sergeant Kenneth

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Cameron. During this set of interviews, Schinkel recorded the verbatim conversations between his partner Cameron and Tews.

¶ 68d 4 The first interview began at 1:35 p.m. on August 10th. The police officers introduced themselves and advised Tews of his right to counsel. Tews advised the police officers that he had spoken to his lawyer and that his lawyer told him not to say anything. At that point, Cameron proceeded with the police caution and seized the clothing Tews was wearing as part of the investigation. Tews was provided with disposable clothing. During the course of the interview, Tews asked for a cigarette and was provided with one. He was left alone for a period of time at 1:51 p.m., and the interview recommenced at 2:05 p.m.

¶ 68e 5 Cameron advised Tews that he believed Tews was involved in the murders and responsible for the deaths of the three victims. Cameron encouraged Tews to reveal his involvement. Cameron restated the evidence the police had implicating him in the events. Throughout the accusations by Cameron, Tews protested that he was not at the murder scene and that his lawyer told him to say nothing. After repeated urgings by the police to tell his side of the story, Tews asked to use the washroom. He was afforded that opportunity. At 2:51 p.m., that portion of the interview was concluded.

¶ 68f 6 At 3:50 p.m., the two police officers re-attended to Tews' interview room. Cameron began his questioning again. That interview concluded at 4:35 p.m., and the subsequent interview reconvened at 5:35 p.m. Tews asked for and was provided with his medication for his ulcer, and he was asked how he was feeling. Cameron accused Tews of lying about his whereabouts at the time of the murder. He was then asked, after being reminded that he had provided blood and hair samples and had agreed to a gun-shot residue test, to provide voluntary fingerprints. He was told specifically that he did not have to provide those fingerprints and that he could call his lawyer before doing so. He replied that he did not need his lawyer and he had nothing to say. When asked if he wanted to provide fingerprints, he replied, "Sure. You have them anyways." He also asked to speak to his father, who was at the Public Safety Building. Tews was allowed access to his father for a short period of time. At 7:00 p.m., the officers re-attended to the interview room and Tews was again asked if he would voluntarily provide the fingerprints. He was advised they would be used as evidence, and he replied that he was aware of that. He then signed a consent form, indicating "[n]o problem." He was advised he would be charged with murder, though he was not being charged that day. He was then released from custody.

¶ 68g 7 Later that evening, Tews' fingerprints were compared with the palm print from the crime scene and there was a positive identification made. Tews was then arrested in the early morning hours of August 11th in Teulon, Manitoba.

¶ 68h 8 Mr. Minuk did not cross-examine Schinkel on the voluntariness of any of Tews' statements. In fact, in cross-examination, counsel referred to the evidence of Tews' fingerprints as the "voluntary fingerprint form."

¶ 68i 9 Cameron's evidence confirmed Schinkel's testimony.

¶ 68j 10 Nowhere in the cross-examination by Tews' counsel of Cameron does counsel challenge the voluntariness of the statement made by Tews to police or the conditions which existed immediately prior to Tews agreeing to give a voluntary fingerprint. Repeatedly through Cameron's cross-examination, he explains that despite suggestions put to Tews regarding his involvement, Tews made no response or denied that involvement. There were no inculpatory statements made by Tews during the interview. The only inculpatory evidence was the fingerprint sample Tews gave.

¶ 68k 11 I have reviewed the police evidence extensively to demonstrate that the record itself reveals the fact that Tews made his statements to the police voluntarily and that he also provided blood and hair samples and fingerprints voluntarily. There is no evidence of coercion, of threats, or of oppression exercised by the police. Tews was fully informed of his rights and had received advice from his counsel when he agreed to provide the fingerprint sample.

QUICKLAW

¶ 68l 12 Mr. Walsh argues that even if the police interrogation is found to be lawful, it should not have been considered by the jury since Tews refused to make a statement. He argues that Tews' right not to make a statement is not respected if his silence in the face of repeated accusations is evidence for the jury to consider.

¶ 68m 13 I am unaware of any law in support of that proposition. The fact that the police continue to interrogate a suspect after that person has told them that his lawyer advised him to say nothing does not render the taking of a voluntary fingerprint sample illegal or in violation of one's rights under the Canadian Charter of Rights and Freedoms (the Charter). Additionally, nothing that Tews said or failed to say prejudiced him. His silence or denials in the face of the police accusations did not prejudice him.

¶ 68n 14 My reading of the record leads me to conclude that indeed it was trial counsel's strategy to place before the jury the evidence of Tews' denials in the face of repeated police accusations and to have the jury consider his willingness to cooperate with the police by providing blood, hair, and fingerprint samples. The defence tactic at trial was to attack the credibility of Taisa Marunchak and the fingerprint expert, Sergeant Buck, not the voluntariness of statements given by Tews.

¶ 68o 15 Mr. Walsh presents a different defence: a defence that cannot succeed. The record speaks for itself.

[Paragraphs 68a-68o were assigned by QL.]

¶ 69 Prior to leaving this issue, I wish to make one further observation. Section 2(1) of the Identification of Criminals Act allows for persons who are in lawful custody, charged with or convicted of an indictable offence, to be fingerprinted or photographed for the purposes of identifying those persons. The voluntary fingerprints provided by Tews cannot be considered conscripted evidence. See R. v. Stillman, [1997] 1 S.C.R. 607. Rather, it was evidence that the police would have been entitled to obtain immediately upon his arrest. Tews had been advised his arrest was pending. Therefore, even if the police investigation could be found to be oppressive (a finding I do not make) and even if the evidence was improperly obtained (again a finding which I do not make), that evidence would have been admitted under s. 24(2) of the Charter. Its admission would not bring the administration of justice into disrepute. See R. v. Nielsen and Stolar (1984), 30 Man.R. (2d) 81 (C.A.).

¶ 70 Tews' second ground of appeal is that the trial judge erred in his instructions to the jury regarding the evidence of Sergeant Buck. He argues that the trial judge failed to instruct the jury how they should evaluate Buck's opinion

> 1 As previously noted, Buck testified as a fingerprint expert. Buck was the City of Winnipeg police officer who headed the identification unit and who had done the comparison and identification of Tews' palm print at the scene of the murder. He described how he made his identification. He was cross-examined on his identification of Tews. The trial judge charged the jury on their obligations to assess expert evidence. He reviewed parts of Buck's evidence. There was no error by the trial judge that warrants appellate interference.
>
> 2 I would dismiss Tews' appeal.

ROBERT SANDERSON'S CONVICTION APPEAL

¶ 71 Mr. Valgardson, counsel for Robert Sanderson on appeal, raises three grounds of appeal: the failure

of the trial judge to order severance following disclosure of the extent of Stevenson's evidence, the adequacy of the Vetrovec warning as it related to the testimony of Taisa Marunchak, and the failure by the trial judge to adequately outline the theory of Robert Sanderson's defence.

¶ 72 None of the issues raised by Robert Sanderson on appeal warrant appellate intervention.

¶ 73 The record does not demonstrate that the trial judge erred in failing to find Taisa Marunchak a witness of unsavoury character or an unreliable witness. The fact that she was a prostitute, was very young, and had a relationship with Stevenson does not call out for that finding. As noted in Vetrovec, the trial judge has a discretion to label a witness of unsavoury character or not. The evidence surrounding this witness does not require such a determination nor the caution that her evidence must not be accepted without supportive evidence. The trial judge instructed the jury on the criteria they should use to assess credibility and reliability. In my view, the trial judge was not required to give any additional instruction to the jury on the assessment of Marunchak's credibility.

¶ 74 Even if I am in error on this point, there was confirmatory evidence of her testimony. One example is Tews wearing Marunchak's sneakers at the time he was arrested. She had testified that when Tews returned with Robert Sanderson to the hotel late in the morning of August 6th, Tews had taken her sneakers because his allegedly were covered with blood.

¶ 75 On the severance motion, this Court has followed the direction provided by the case of R. v. Weir (No. 4) (1899), 3 C.C.C. 351 (Que. Q.B.). A decision to sever lies within the trial judge's discretion. See R. v. Unger (K.W.) and Houlahan (T.L.) (1993), 85 Man.R. (2d) 284 (C.A.). Those parts of Stevenson's evidence which implicated Robert Sanderson were specifically addressed by the trial judge immediately upon the completion of Stevenson's testimony. He warned the jury to confine their use of Stevenson's evidence to Roger Sanderson's confession and not to Robert Sanderson, and he re-issued that warning in his general charge. The significant warning and instruction that the trial judge gave the jury overcame any prejudice that might have arisen as a result of the joint trial. The trial judge was clearly of the view that there was a benefit to be gained by having the entire matter placed before the jury in one trial. He was correct.

¶ 76 Finally, the trial judge made no error when he reviewed Robert Sanderson's defence to the jury. There is no obligation upon a trial judge to refer to all of the evidence in support of the defence position. He is simply required to treat the theory of the defence and the theory of the Crown in a balanced way. This the trial judge did.

¶ 77 In the result, the appeals against conviction of Robert Tews and Robert Sanderson are dismissed. The appeal against conviction by Roger Sanderson is allowed, and a new trial is ordered.

HELPER J.A.
SCOTT C.J.M.:— *I* concur.
MONNIN J.A.:— I concur.

QL Update: 990322
qp/s/jjl/DRS

Forensic Evidence Review

Forensic Review Committee
Government of Manitoba
Sexual Assault, Robbery and Other Cases

Terms of Reference

The Deputy Attorney General of Manitoba has established an advisory committee to examine certain sexual assault, robbery and other cases prosecuted in Manitoba where the Crown relied upon a particular type of forensic evidence. The review is similar to a recently completed review of certain homicide cases.

Composition of the Advisory Committee

The committee shall consist of a General Counsel from the Manitoba Prosecution Service as Chair; a senior Crown attorney; a lawyer in the private sector in Manitoba designated by the Association in Defence of the Wrongfully Convicted; a representative from each of the Royal Canadian Mounted Police and the Winnipeg Police Service; and a forensic expert unconnected with any law enforcement agency, designated by the Deputy Attorney General after consultation with the other members of the committee. Other persons with expertise may be consulted by the committee from time to time, through the Chair.

Objectives of the Advisory Committee

The committee shall consider whether there is a reasonable basis to believe that a miscarriage of justice has taken place in cases of sexual assault or robbery prosecuted in Manitoba during the past 15 years where:

- the Crown tendered and relied upon microscopic hair comparison evidence;
- the accused pleaded not guilty at trial, asserting factual innocence, but was found guilty; and
- the conviction was appealed to the Court of Appeal, still asserting factual innocence, and the appeal was dismissed.

The committee will actively seek out such cases. It shall also invite defence attorneys to make submissions in relation to individuals convicted of other indictable offences if microscopic hair comparison evidence was relied upon and the case was appealed in the past 15 years, maintaining factual innocence throughout. The committee is also authorized to take any other steps it deems appropriate to identify cases of this nature.

Amongst other issues, the committee shall consider the following factors:

a. the nature of the microscopic hair evidence tendered in the context of the trial record;
b. whether, with the benefit of current scientific expertise, the conclusions tendered by the Crown at trial respecting this evidence were incorrect or overstated;
c. the extent to which the Crown relied upon this evidence to prove the case;
d. any comments made by the trial judge concerning the probative value or weight to be given to this evidence; and
e. any other factors respecting this evidence that may assist in assessing whether a

miscarriage of justice has occurred.

During the course of its work, the committee, through the Chair, may arrange for DNA or other scientific testing of the evidence to assist the committee during the review.

The committee shall provide a report on its findings and recommendations to the Deputy Attorney General by or before September 15, 2005.

Public communication concerning the work of the committee during the review, should that prove necessary, will be made through the Chair. Upon receipt of the report of the committee, the Deputy Attorney General will publicly announce the results of the committee's work.

Dated at Winnipeg, Manitoba this 15th day of September, 2004.

110 Legislative Building,
Winnipeg MB R3C 0V8